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Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1248

GTE SYLVANIA, INCORPORATED, RCA CORPORATION, THE MAGNAVOX COMPANY, ZENITH RADIO CORPORATION, MOTOROLA, INC., WARWICK ELECTRONICS, INC., AERONUTRONIC FORD CORPORATION, MATSUSHITA ELECTRIC CORPORATION OF AMERICA, SHARP ELECTRONIC CORPORATION, TOSHIBA-AMERICA, INC., GENERAL ELECTRIC COMPANY, ADMIRAL CORPORATION, *Petitioners*,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., PUBLIC CITIZEN'S HEALTH RESEARCH GROUP, CONSUMER PRODUCT SAFETY COMMISSION, RICHARD O. SIMPSON, BARBARA H. FRANKLIN, LAWRENCE KUSHNER, CONSTANCE NEWMAN, R. DAVID PITTLE, SADYE DUNN, *Respondents*.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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SECOND OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC. et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Filed December 22, 1978

Before WRIGHT, *Chief Judge*, and BAZELON, and ROBINSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: At the core of this litigation [1] is appellants' challenge [2] under the Freedom of Information Act (FOIA)[3] to the Consumer Product

1. Our earlier decisions are cited *infra* notes 4 and 9.

2. Because of the grounds on which our previous decisions rested, it was unnecessary to deal with the problems that are squarely presented now.

3. Pub. L. No. 89-554, 80 Stat. 383 (1966), *as amended*, 5 U. S. C. § 552(a)(3)-(e) (1976).

Safety Commission's failure to disclose data concerning accidents attributable to the operation of television sets. When their cause was first before us, we reversed the District Court's ruling that no case or controversy was presented.[4] That determination had been premised on the Commission's acknowledged willingness to release the data save for a ban imposed thereon by a preliminary injunction awarded television manufacturers by the District Court for the District of Delaware in a reverse-FOIA suit involving the same information.[5] We held that the Delaware action, to which appellants were not parties, was no obstacle to their effort in the District Court here.[6] We reasoned that a preliminary injunction is designed merely to preserve the status quo ante pending final decision, and " 'is not an adjudication of rights in any proper sense of the term. . . .' " [7] Because the Delaware court had entered an order "closing out" the case before any final stage had been reached, we concluded that the Delaware proceeding was not "an insuperable barrier to the suit at bar." [8]

We later were informed that the Delaware action had not really been terminated, but that the "closing out" order was apparently a means merely of placating the periodic call for statistics reflecting judicial efficiency in processing caseloads.[9] In denying rehearing, we noted that appellants had still not been added as parties to the Delaware proceedings, and explained that "[s]ince all

4. *Consumers Union v. Consumer Prod. Safety Comm'n,* 182 U. S. App. D. C. 351, 561 F. 2d 349 (1977).

5. See *id.* at 356, 561 F. 2d 354.

6. *Id.* at 359, 561 F. 2d at 357.

7. *Id.* at 358, 561 F. 2d at 356, quoting *United States Elec. Lighting Co. v. Metropolitan Club,* 6 App. D. C. 536, 544 (1895).

8. 182 U. S. App. D. C. at 358, 561 F. 2d at 356.

9. *Consumers Union v. Consumer Prod. Safety Comm'n,* 184 U. S. App. D. C. 146, 147, 565 F. 2d 721, 722 (1977).

necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA." [10]

Our prior opinions spurred the manufacturers to renew vigorously their pursuit of a judgment on the merits in Delaware, and appellants made no effort to have the District Court here enjoin them from that course. And the Commission, at long last, moved in the Delaware court for a change of venue to the District of Columbia, but added no alternative motion to join the FOIA requesters in the Delaware case—in which, we are now told, their rights have been fully and finally adjudicated. The Delaware court denied transfer primarily on the ground that, though the Commission faced the possibility of inconsistent outcomes on the merits, "[t]he time for the Commission to have moved for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here." [11]

While a petition to the Supreme Court for a writ of certiorari in this case was pending, the Delaware court issued a permanent injunction.[12] The Supreme Court subsequently granted certiorari and remanded the case to us "for further consideration in light of the permanent injunction." [13] Thus we are now brought face-to-face with the issue we had earlier reserved: Does a judgment in

10. *Id.*

11. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n,* 438 F. Supp. 208, 212 (D. Del. 1977). The court noted that "the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia." *Id.* at 211.

12. *GTE Sylvania, Inc. v. Consumer Prod. Safety Comm'n,* 443 F. Supp. 1152 (D. Del. 1977), *appeal pending,* No. 78-1328 (3d Cir.).

13. *GTE Sylvania, Inc. v. Consumers Union,* 434 U. S. 1030, 98 S. Ct. 761, 54 L. Ed. 2d 778 (1978).

favor of information-suppliers in a reverse-FOIA suit bar requesters not parties thereto from litigating their contention that the Freedom of Information Act mandates disclosure? [14] The answer, we think, becomes clear once one investigates the interrelationship of the Act and reverse-FOIA suits in light of traditional principles governing preclusion of subsequent litigation.

I. The Rationales for FOIA and Reverse-FOIA Suits.

Before the Freedom of Information Act was adopted, official dissemination of information was frequently marked by caprice,[15] and suits to obtain information or

14. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 359, 561 F. 2d at 357. After the remand, we called upon the parties for, and they submitted, supplemental memoranda setting forth their views as to the course the court should take, addressing particularly the question stated in text.

15. Section 3(c) of the original Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 238 (1946), which the Freedom of Information Act replaced, provided that "[s]ave as otherwise required by statute, matters of official record shall in accordance with published rule be made available to persons properly and directly concerned except information held confidential for good cause found." This section was perceived as "not intended to open up Government files for general inspection," Attorney General's Manual on Administrative Procedure Act 25 (1947), and agency responses to requests for information often evidenced an appreciation of secrecy for secrecy's sake. See S. Rep. No. 813, 89th Cong., 2d Sess. 3-5 (1965); H. R. Rep. No. 1497, 89th Cong., 2d Sess. 5-6 (1966); *EPA v. Mink*, 410 U. S. 73, 79, 93 S. Ct. 827, 832, 35 L. Ed. 2d 119, 127-128 (1973); *Getman v. NLRB*, 146 U. S. App. D. C. 209, 217-218, 450 F. 2d 670, 678-679, *stay denied*, 404 U. S. 1204, 92 S. Ct. 7, 30 L. E. 2d 8 (1971); Note, *Comments on Proposed Amendments to Section 3 of the Administrative Procedure Act: The Freedom of Information Bill*, 40 Notre Dame Law. 417, 435-437 (1965). The breadth of agency discretion under § 3(c) was in no way curtailed by the courts, see, *e.g.*, *FCC v. Schreiber*, 381 U. S. 279, 293, 85 S. Ct. 1459, 1469, 14 L. Ed. 2d 383, 393 (1965); *cf. Appeal of SEC*, 226 F. 2d 501, 517-519 (6th Cir. 1955); but *cf. Graber Mfg. Co. v. Dixon*, 223 F. Supp. 1020 (D. D. C. 1963), and that section had little practical effect on prior law. *Cf. United States ex rel. Stowell v. Deming*, 57 App. D. C. 223, 224, 19 F. 2d 697, 698, *cert. denied*, 275 U. S. 531, 48 S. Ct. 28, 72 L. Ed. 419 (1927).

to forestall its release met with "far from uniform" [16] judicial treatment.[17] The Act was intended to rationalize agency disclosure policies [18] by providing a mechanism for balancing the public's "right to know" against the agency's interest in preserving confidentiality.[19] If a court finds that the Act applies to material for which a request has been properly made,[20] that is the end of the matter; the

16. 1 K. Davis, Administrative Law Treatise § 3.13, at 227 (1958).

17. See cases cited *supra* note 15. See also the many cases dealing with the propriety of agency disclosure *sua sponte* or in the course of agency proceedings. *E.g.*, *FCC v. Schreiber*, *supra* note 15; *Utah Fuel Co. v. National Bituminous Coal Comm'n*, 306 U. S. 56, 59 S. Ct. 409, 83 L. Ed. 483 (1939); *Norwegian Nitrogen Prods. Co. v. United States*, 288 U. S. 294, 53 S. Ct. 350, 77 L. Ed. 796 (1933); *FCC v. Menzies*, 145 F. Supp. 164 (D. Md. 1956), *aff'd on other grounds*, 241 F. 2d 81 (4th Cir.), *cert. denied*, 353 U. S. 957, 77 S. Ct. 863, 1 L. Ed. 2d 908 (1957). See generally *Appeal of SEC*, *supra* note 15, 226 F. 2d at 517-519 and cases there cited; J. Chamberlain, N. Dowling & P. Hays, The Judicial Function in Administrative Agencies 112-120 (1942); 1 K. Davis, Administrative Law Treatise § 3.13 (1958 & 1970 Supp.); Rourke, *Law Enforcement Through Publicity*, 24 U. Chi. L. Rev. 225, 242-247 (1957).

18. See, *e.g.*, S. Rep. No. 813 *supra* note 15, at 3:

> It is the purpose of the present bill . . . to establish a general policy of full agency disclosure unless information is exempted. . . . It is essential that agency personnel, and the courts as well, be given definitive guidelines in setting informational policies.

19. *Id.* See also *EPA v. Mink*, *supra* note 15, 410 U. S. at 79-80, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128.

20. When no "request for identifiable records" has been made, the statute is not activated. 5 U. S. C. § 552(a)(3) (1976); see S. Rep. No. 813, *supra* note 15, at 2; *cf., e.g., Nader v. Volpe*, 151 U. S. App. D. C. 90, 93 n. 26, 466 F. 2d 261, 264 n. 26, 18 A. L. R. Fed. 595 (1972); *FTC v. Cinderella Career & Finishing Schools, Inc.*, 131 U. S. App. D. C. 331, 341 n. 15 (1968) (concurring opinion). See also *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n*, 555 F. 2d 82, 93-94 (3d Cir. 1977). But see *Pennzoil Co. v. FPC*, 534 F. 2d 627, 630 (5th Cir. 1976); *Continental Oil Co. v. FPC*, 519 F. 2d 31, 36 (5th Cir. 1975), *cert. denied*, 425 U. S. 971, 96 S. Ct. 2168, 48 L. Ed. 2d 794 (1976); *Union Oil Co. v. FPC*, 542 F. 2d 1036, 1045 (9th Cir. 1976).

material *must* be disclosed,[21] for the Act effectuates a congressional judgment that in those circumstances no public or private interest in secrecy outweighs the benefits attending public access.[22] Moreover, in determining whether the Act is operative, the legislative command that disclosure be the rule and exemptions be narrowly construed [23] must be sedulously observed. But Congress in the same breadth specified classes of information to which the Act—and its policy of openness—"do[] not apply." [24] When a court finds that requested material

21. *NLRB v. Sears, Roebuck & Co.*, 421 U. S. 132, 147-148, 95 S. Ct. 1504, 1515, 44 L. Ed. 2d 29, 45-46 (1975).

22. S. Rep. No. 813, *supra* note 15, at 5-6; see, *e.g.*, *Getman v. NLRB*, *supra* note 15, 146 U. S. App. D. C. at 217-219, 450 F. 2d at 678-680; *Soucie v. David*, 145 U. S. App. D. C. 144, 154, 448 F. 2d 1067, 1077 (1971). See also *Department of the Air Force v. Rose*, 425 U. S. 352, 379 n. 17, 96 S. Ct. 1592, 1607 n. 17, 48 L. Ed 2d 11, 31 n. 17 (1976). See generally K. Davis, Administrative Law of the Seventies § 3A.6, at 61 (1976).

23. See *Department of the Air Force v. Rose*, *supra* note 22, 425 U. S. at 361, 96 S. Ct. at 1599-1600, 48 L. Ed. 2d at 21, citing *EPA v. Mink*, *supra* note 15, 410 U. S. at 79, 93 S. Ct. at 832, 35 L. Ed. 2d at 127-128; *Vaughn v. Rosen*, 157 U. S. App. D. C. 340, 343, 484 F. 2d 820, 823 (1973), *cert. denied*, 415 U. S. 977, 94 S. Ct. 1564, 39 L. Ed. 2d 873 (1974), *aff'd after remand*, 173 U. S. App. D. C. 187, 193, 523 F. 2d 1136, 1142, 28 A. L. R. Fed. 623 (1975); *Soucie v. David*, *supra* note 22, 145 U. S. App. D. C. at 157, 448 F. 2d at 1080.

24. 5 U. S. C. § 552(b) (1976); S. Rep. No. 813, *supra* note 15, at 3; see, *e.g.*, *Administrator v. Robertson*, 422 U. S. 255, 261, 95 S. Ct. 2140, 2145, 45 L. Ed. 2d 164, 170 (1975); *NLRB v. Sears, Roebuck & Co.*, *supra* note 21, 421 U. S. at 137, 95 S. Ct. at 1510, 44 L. Ed. 2d at 39; *EPA v. Mink*, *supra* note 15, 410 U. S. at 74, 93 S. Ct. at 830, 35 L. Ed. 2d at 125. Since the Act is "not a withholding statute but a disclosure statute," S. Rep. No. 813, *supra* note 15, at 5; see S. Rep. No. 584, 93d Cong., 2d Sess. 6 (1974); H. R. Rep. No. 1419, 92d Cong., 2d Sess. 7 (1972), the mere fact that information falls within one of its exemptions does not of itself outlaw disclosure. See *Planning Research Corp. v. FPC*, 181 U. S. App. D. C. 33, 36-37 n. 4, 555 F. 2d 970, 973-974 n. 4 (1977), citing S. Rep. No. 584, *supra*, at 6 and *Charles River Park "A", Inc. v. HUD*, 171 U. S. App. D. C. 286, 293, 519 F. 2d 935, 942 (1974) and K. Davis, Administrative Law of the Seventies § 3A.5, at 58-61 (1976) and K. Davis, Administrative Law Treatise

falls into one of these categories, and resultantly that its divulgence is not compelled by the Act, the propriety of voluntary disclosure by the agency must hinge on reconciliation with such other law as is pertinent—whether statute, regulation, the administrative "common law" or general principles of equity.[25]

Some of these residual legal rules may endow private parties with legally cognizable interests in the confidentiality of exempted information; others may bestow on some a greater entitlement to information than the Act itself gives the general public.[26] Since the agency's pur-

24. (Cont'd.)
§ 3A.5, at 122 (1970 Supp.); *Chrysler Corp. v. Schlesinger*, 565 F. 2d 1172, 1185 (3d Cir. 1977), *cert. granted*, 435 U. S. 914, 98 S. Ct. 1466, 55 L. Ed. 2d 504 (1978); *Superior Oil Co. v. FERC*, 563 F. 2d 191, 204 (5th Cir. 1977); Clement, *The Rights of Submitters to Prevent Agency Disclosure of Confidential Business Information: The Reverse Freedom of Information Lawsuit*, 55 Texas L. Rev. 587, 598-600 (1977); *cf.* Drachsler, *The Freedom of Information Act and the "Right" of Non-Disclosure*, 28 Ad. L. Rev. 1, 5-6 (1976); Project, *Government Information and the Rights of Citizens*, 73 Mich. L. Rev. 971, 1158-1159 (1975); Comment, *Reverse Freedom of Information Act Suits: Confidential Information in Search of Protection*, 70 Nw. L. Rev. 995, 1010-1011 (1976). See also *Associated Dry Goods Corp. v. EEOC*, 419 F. Supp. 814, 821 (E. D. Va. 1976). But *cf. Westinghouse Elec. Corp. v. Schlesinger*, 542 F. 2d 1190, 1197 (4th Cir. 1976), *cert. denied*, 431 U. S. 924, 97 S. Ct. 2199, 53 L. Ed. 2d 239 (1977); *McCoy v. Weinberger*, 386 F. Supp. 504, 508 (W. D. Ky. 1974).

25. See, *e.g.*, *Planning Research Corp. v. FPC*, *supra* note 24, 181 U. S. App. D. C. at 36-37 n. 5, 555 F. 2d at 973-974 n. 5, quoting K. Davis, Administrative Law Treatise § 3A.5, at 122 (1970 Supp.); *Charles River Park "A", Inc. v. HUD*, *supra* note 24, 171 U. S. App. D. C. at 140-141, 519 F. 2d at 941-942; *Chrysler Corp. v. Schlesinger*, *supra* note 24, 565 F. 2d at 1192; *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, 542 F. 2d at 1197-1198; *GSA v. Benson*, 415 F. 2d 878, 880 (9th Cir. 1969). But *cf. Babcock & Wilcox Co. v. Rumsfeld*, 70 F. R. D. 595, 601 (N. D. Ohio 1976).

26. Compare, *e.g.*, *United States v. Nixon*, 418 U. S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) with *EPA v. Mink*, *supra* note 15, 410 U. S. at 86-88, 93 S. Ct. at 835-836, 35 L. Ed. 2d at 131-133.

poses will only coincidentally correspond with those of nongovernmental parties, it would be folly to entrust these often-critical private interests [27] to unreviewable bureaucratic discretion. This court has accordingly held that when an agency asserts its intention to comply with a demand for information, parties who would be aggrieved by compliance may sue for a declaration whether that release would be lawful.[28] But such litigants must

27. At least one reverse-FOIA action has been brought by individuals seeking to prevent disclosure to business concerns of confidential information about them. *Sonderegger v. United States Dep't of Interior*, 424 F. Supp. 847 (D. Idaho 1976) (request of claim files on each victim in Teton Dam disaster). Many other FOIA cases, mostly turning on the scope of 5 U. S. C. § 552(b)(6) (1976), indicate that requesters may desire information about "little people." *E.g., Department of the Air Force v. Rose, supra* note 22, 425 U. S. at 373-376, 96 S. Ct. at 1606-1607, 48 L. Ed. 2d at 28-30 (Air Force Academy disciplinary records); *Rural Housing Alliance v. United States Dep't of Agriculture*, 162 U. S. App. D. C. 122, 126, 498 F. 2d 73, 77 (1974) ("information regarding marital status, legitimacy of children, identity of fathers . . . , medical condition, welfare payments, alcoholic consumption, family fights, and so on"). *Ackerly v. Ley*, 137 U. S. App. D. C. 133, 136, 420 F. 2d 1336, 1339 (1967) (medical records); *Wine Hobby U. S. A., Inc. v. Internal Revenue Serv.*, 502 F. 2d 133, 136-137 (3d Cir. 1974) (names, addresses, family status, and personal activities within the home); *Disabled Officer's Ass'n v. Rumsfeld*, 428 F. Supp. 454 (D. D. C. 1977), *aff'd*, No. 77-1504 (D. C. Cir. Apr. 18, 1977) (names and addresses of former military officers who retired with a disability); *Columbia Packing Co., Inc. v. United States Dep't of Agriculture*, 417 F. Supp. 651, 654 (D. Mass. 1976), *aff'd*, 563 F. 2d 495 (1st Cir. 1977) ("a detailed synopsis of each individual's career within the [government], data about family relationships, financial information and medical records"); *cf. Ditlow v. Schultz*, 170 U. S. App. D. C. 352, 517 F. 2d 166 (1975). Surely these individuals should not be without recourse to judicial review of agency action so deeply affecting their privacy. See generally, Hulett, *Privacy and the Freedom of Information Act*, 27 Ad. L. Rev. 275 (1975); Project, *supra* note 24, 73 Mich. L. Rev. at 1161-1162, 1336-1338.

28. *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 141, 519 F. 2d at 942; see *Planning Research Corp. v. FPC, supra* note 24, 181 U. S. App. D. C. at 40-41, 555 F. 2d at 977-978. See also *Sears, Roebuck & Co. v. GSA*, 180 U. S. App. D. C. 202, 204-205, 553 F. 2d 1378, 1380-1381 (1977).

first pass through the needle's eye of the Freedom of Information Act,[29] for if the Act calls for disclosure they have, of course, no right whatsoever to confidentiality.[30] Only if the Act does not govern need the court examine other sources of law—which may prohibit dissemination, give the agency judicially reviewable or unreviewable discretion to release or retain, or even mandate disclosure, depending on the circumstances.[31]

Reverse-FOIA suits therefore are no blight upon the landscape of the law, but the propriety of their role in any scenario must be carefully considered. Enforcement of such rights of confidentiality as federal law might otherwise recognize must not be allowed to choke the free flow of data contemplated by Congress in the Freedom of Information Act. Surely such an obstruction would be interposed if a judgment adverse to the agency in a reverse-FOIA action were permitted to bar later FOIA suits for the documents in question when no one interested in obtaining the material was a party to the earlier litigation. In our view, no such preemption is warranted, as this case tellingly exemplifies.

II. Theories for Preclusion of Subsequent FOIA Suits

Federal courts in different jurisdictions may sometimes reach conflicting conclusions on the duties of an ad-

29. *Sears, Roebuck & Co. v. GSA, supra* note 28, 180 U. S. App. D. C. at 205, 553 F. 2d at 1381, citing *Charles River Park "A", Inc. v. HUD, supra* note 24, 171 U. S. App. D. C. at 291-292 n. 4, 294 n. 10, 519 F. 2d at 940 n. 4, 941 n. 10 and *Westinghouse Elec. Corp. v. Schlesinger, supra* note 24, 542 F. 2d at 1208 n. 57.

30. See note 22 *supra*.

31. See cases cited *supra* note 23; *GSA v. Benson, supra* note 25, 415 F. 2d at 880, (alternative holding that agency is bound by regulation specifying that even if requested material is exempt, it should be released absent a compelling reason for nondisclosure); *cf.* S. Rep. No. 584, *supra* note 24, at 6; H. R. Rep. No. 1419, *supra* note 24, at 7 (approving regulations similar to those invoked in *Benson*); Drachsler, *supra* note 24, 28 Ad. L. Rev. at 2, 9-11.

ministrative agency, but normally without placing it in an impossible dilemma or bringing on a direct clash of judicial power. A serious conundrum, however, arises when, as here, the subject matter is information and the dispute is over whether it should be disclosed to the public. Once released pursuant to judicial decree, the data cannot be bottled up within the court's geographical area; with modern communications, information made public at any one point may soon be available throughout the country, often within moments. By the same token, when a court orders an agency to retain information, its edict is absolutely useless unless it stops agency action everywhere. Consequently, the first court to decide—in either a FOIA or a reverse-FOIA suit—will have pronounced a judgment that might reach across the Nation, or, on the other hand, might not have any practical effect even in its own jurisdictional domain.

That is exactly the situation here. The Delaware proceeding began, and the Commission was temporarily enjoined, before the appellant-requesters filed their own action in the District of Columbia seeking disclosure. By the time appellants sued, the District Court here knew that should the litigation before it continue, a decision contrary to that of the Delaware court might be reached, and that the Commission could not possibly comply with each of the conflicting orders.

Thus focused, the issue is the proper response of the court chronologically second. We earlier rejected one solution—dismissal for absence of a case or controversy—and we adhere to that position [32] for the reasons then stated.[33] That still leaves other alternatives—dismissal

32. See *Consumers Union of the United States, Inc. v. Consumer Prod. Safety Comm'n, supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

33. In the Supreme Court, the Commission stated, contrary to its argument here, that it had become "persuaded . . . that a case

on a theory of *stare decisis,* collateral estoppel or comity, or continuation of the suit in some manner. For more than ample reason, we have chosen the latter course.

A. *Stare Decisis.*

We surely do not gainsay that "the doctrine of stare decisis is still a powerful force in our jurisprudence." [34] So, a court resolving a FOIA claim may choose to defer to a previous judicial decision that the Act does or does not apply to particular documents,[35] whether the prior action sought disclosure or restraint. It has not, however, been our experience that federal judges are either careless or timorous. The notion that any would defer on *stare decisis* grounds to a decision by a co-ordinate court with which he disagreed is unworthy of comment.[36]

33. (Cont'd.)
or controversy, within the meaning of Article III, exists between the requesters and the Commission." Brief for Federal Respondents in Opposition to Petition for a Writ of Certiorari, at 5, *GTE Sylvania, Inc. v. Consumers Union, supra* note 13.

34. *United States v. Maine,* 420 U. S. 515, 527, 95 S. Ct. 1155, 1161, 43 L. Ed. 2d 363, 371 (1975).

35. See generally, Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies,* 55 N. C. L. Rev. 123 (1977). But *cf. Robertson v. Department of Defense,* 402 F. Supp. 1342, 1346-1347 (D. D. C. 1975).

36. See *City Stores Co. v. Lerner Shops of District of Columbia, Inc.,* 133 U. S. App. D. C. 311, 315, 410 F. 2d 1010, 1014 (1969) ("[d]ecisions of district courts and other courts of appeal are, of course, not binding on us and are looked to only for their persuasive effect"; "[i]f they fail to persuade by the use of sound and logical reasoning, they will not be followed, no matter how great their number"); *Watson v. Allen,* 103 U. S. App. D. C. 5, 10, 254 F. 2d 342, 347 (1958), *later appeal,* 107 U. S. App. D. C. 25, 274 F. 2d 87 (1959), (decisions of other courts of appeals "are persuasive and entitled to deference but are not authoritatively binding"). See generally, Vestal, *supra* note 35, 55 N. C. L. Rev. at 130-136. But see Comment, *Securing Uniformity in National Law: A Proposal for National Stare Decisis in the Courts of Appeals,* 85 Yale L. J. 1219 (1978).

B. *Collateral Estoppel.*

Furthermore, the doctrine of collateral estoppel, which does bind parties to a previous suit to such determinations of material issues as are encompassed in the judgment,[37] only rarely precludes nonparties from litigating the same issues afresh.[38] If the FOIA applicant has neither been a party nor otherwise represented in a prior successful reverse-FOIA suit, he will not be blocked from taking his controversy to the courts.[39]

The only parties here who were litigants in Delaware are the Consumer Product Safety Commission and the manufacturers who sought to prevent disclosure of materials that the Commission was prepared to turn over to appellants. An agency's interests in FOIA suits of either

37. See, *e.g., Nixon v. Richey,* 168 U. S. App. D. C. 172, 180 n. 75, 513 F. 2d 430, 438 n. 75 (1975), and cases cited therein; *Wolfe v. Froehlke,* 358 F. Supp. 1318, 1319 (D. D. C. 1973), *aff'd,* 166 U. S. App. D. C. 274, 510 F. 2d 654 (1974). See generally, Vestal, *Preclusion/Res Judicata Variables: Parties,* 50 Iowa L. Rev. 27 (1964).

38. See, *e.g., Sea-Land Servs., Inc. v. Gaudet,* 414 U. S. 573, 593-595, 94 S. Ct. 806, 819, 39 L. Ed. 2d 9, 25-26 (1974), citing, *inter alia, Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation,* 402 U. S. 313, 320-327, 91 S. Ct. 1434, 1439-1442, 28 L. Ed. 2d 788, 795-799 (1971); Vestal, *supra* note 37, 50 Iowa L. Rev. at 63-64; *Developments in the Law—Res Judicata,* 65 Harv. L. Rev. 818, 855-856 (1952). See also *Hansberry v. Lee,* 311 U. S. 32, 40, 61 S. Ct. 115, 117, 85 L. Ed. 22, 26 (1940). We are cognizant of isolated decisions of lower federal courts advancing bold new rules for preclusion of nonparties, which have been hailed by commentators as a sign of things to come. See generally McCoid, *A Single Package for Multiparty Disputes,* 28 Stan. L. Rev. 707 (1976); Vestal, *Res Judicata/Preclusion: Expansion,* 47 S. Calif. L. Rev. 357 (1974); Vestal, *Claim Preclusion and Parties in Privity:* Sea-Land Services v. Gaudet *in Perspective,* 60 Iowa L. Rev. 973 (1975). We take no view on these developments, for they do not apply to the situation under discussion here, in which by no means did appellants have a "vicarious day in court." Note, *Collateral Estoppel of Non-parties,* 87 Harv. L. Rev. 1485, 1500 (1974).

39. See *Wolfe v. Froehlke, supra* note 37, 358 F. Supp. at 1319; *Robertson v. Department of Defense, supra* note 35, 402 F. Supp. at 1346-1347.

stripe diverge markedly from private interests,[40] and raise serious doubt whether the agency could ever be deemed to represent members of the public. Indeed, congressional appreciation of that divergence underlies the Act. The institutional predilections that distinguish the agency's position from the citizens argue against permitting the Commission to do via litigation what it may not do by agreement [41]—to bar applicants from information to which the Act mandates access. Far less do they justify departure from the rule, articulated in the milieu of antitrust enforcement, that "just as the Government is not bound by . . . litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation." [42]

40. As an institutional matter, the agency's policy goals will best be served if it is completely free to expend or conserve the power of its knowledge. See, *e.g.,* Rourke, *supra* note 17, 24 U. Chi. L. Rev. 231-233. One commentator has noted that "[i]t may be bad for appearances in a period of 'openness' and 'honesty' for an agency to refuse disclosure. . . ." O'Reilly, *Government Disclosure of Private Secrets Under the Freedom of Information Act,* 30 Bus. Law., 1125, 1134 (1975); accord, Note, *Protection from Government Disclosure—The Reverse FOIA Suit,* 1976 Duke L. J. 330, 359 (1976), *cf.* Comment, *supra* note 24, 70 Nw. U. L. Rev. at 998-999. On the other hand, self-interest may often move the agency to keep secret information that, if revealed, would embarrass it or frustrate its regulatory objectives. See S. Rep. No. 813, *supra* note 15, at 3; H. R. Rep. No. 1497, *supra* note 15, at 5-6.

41. *Petkas v. Staats,* 163 U. S. App. D. C. 327, 329, 501 F. 2d 887, 889 (1974).

42. *Sam Fox Publishing Co. v. United States,* 366 U. S. 683, 690, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604, 610 (1961); see *Battle v. Liberty Nat'l Life Ins. Co.,* 493 F. 2d 39, 52 (5th Cir. 1974), *cert. denied,* 419 U. S. 110, 95 S. Ct. 784, 42 L. Ed. 2d 807 (1975); *Robertson v. Department of Defense, supra* note 35, 402 F. Supp. at 1346-1347; *cf. City of Chicago v. General Motors Corp.,* 332 F. Supp. 285 (W. D. Ill. 1971), *aff'd,* 467 F. 2d 1262 (1972). But *cf. Proctor & Gamble Co. v. Byers Transp. Co., Inc.,* 355 F. Supp. 547, 558 n. 18 (W. D. Mo. 1973).

We have no quarrel with the proposition that in appropriate circumstances the Government may represent private parties in a judicial proceeding and that that suffices to bar those represented

Nor can the agency's role in reverse-FOIA litigation be likened to that of the named representative of a class in a defendant class action, and thus raise the spectre that a judgment against the agency would extend to bind all putative members of the hypothetical class it supposedly represents. At the outset, the clash of purposes would render the bureaucracy suspect as a representative of any class composed of FOIA requesters.[43] Even passing that, when—as in the present circumstances—no class has been convened, no preclusive effect can possibly follow, and the public's right to know remains secure.

C. *Comity.*

That brings us lastly to comity, here reflected in the principle that "[o]rdinarily, the court first acquiring jurisdiction of a controversy should be allowed to proceed

42. (Cont'd.)
from collaterally attacking the resulting judgment. See *Southwest Airlines Co. v. Texas Int'l Airlines*, 546 F. 2d 84, 91-101 (5th Cir.), *cert. denied*, 434 U. S. 832, 98 S. Ct. 117, 54 L. Ed. 2d 93 (1977); Restatement (Second), of Judgments, § 85, comment *d* at 61-62 (Tent. Draft No. 2, 1975). But to accept a governmental agency as an adequate representative of requesting parties whenever the agency nominally favors disclosure is to ignore the stark fact that their interests are not congruent: The agency is concerned with conserving the time and energy of its personnel, and with avoiding establishment of a precedent that in the future might support mandatory divulgence of information it would prefer to keep confidential; the requesters simply want the information. See also note 40 *supra*.

43. To view the Commission as litigant of the requesters' rights in their stead "is to attribute to [it] a power that it cannot be said that [it] has assumed to exercise, and a responsibility which, in view of [its] interests[,] it does not appear that [it] could rightly discharge." *Hansberry v. Lee*, *supra* note 38, 311 U. S. at 46, 61 S. Ct. at 120, 85 L. Ed. at 29. "Such a selection of representatives for purposes of litigation, whose substantial interests are not necessarily or even probably the same as those whom they are deemed to represent, does not afford that protection to absent parties which due process requires." *Id.* at 45, 61 S. Ct. at 119-120, 85 L. Ed. at 29.

with it without interference from other courts under suits subsequently instituted."[44] Though we have not the smallest quarrel with that time-honored dogma, it should not be permitted to hold sway outside situations in which it was designed to apply. Created to assure judicial efficiency and to reflect abiding respect for other courts,[45] the doctrine surely does not contemplate that fundamental rights of citizens will be adjudicated in forums from which they are absent.

In fact, though perhaps subconsciously at times, the courts have not allowed comity to be debased in such a fashion. The decisions invoking the principle involve circumstances in which the plaintiff in the later federal suit was a party to the earlier action involving the same issues and subject matter.[46] When everyone with an interest

44. *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, 140 F. 2d 47, 49 (4th Cir. 1944).

45. See *Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817, 96 S. Ct. 1236, 1246, 47 L. Ed. 2d 483, 498 (1976); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 409, 525 F. 2d 620, 626 (1975).

46. *E.g.*, *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U. S. 180, 181, 72 S. Ct. 219, 220, 96 L. Ed. 200, 202 (1952) (parties to subsequent suit were both involved in first action); *Columbia Plaza Corp. v. Security Nat'l Bank*, 173 U. S. App. D. C. 403, 411, 525 F. 2d 620, 628 (1975) (all parties to subsequent suit were involved in first action); *Hilton Hotels Corp. v. Weaver*, 117 U. S. App. D. C. 83, 325 F. 2d 1010 (1963), *cert. denied*, 376 U. S. 951, 84 S. Ct. 968, 11 L. Ed 2d 971 (1964) (same plaintiff in both suits; substantially the same parties altogether); *Food Fair Stores, Inc. v. Square Deal Market Co.*, 88 U. S. App. D. C. 176, 177, 187 F. 2d 219, 220 (1951) (same parties and issues); *Semmes Motors, Inc. v. Ford Motor Co.*, 429 F. 2d 1197, 1202-1203 (2d Cir. 1970) (same parties and issues); *Cresta Blanca Wine Co. v. Eastern Wine Corp.*, 143 F. 2d 1012, 1014 (2d Cir. 1944) (second suit by defendant in prior proceeding against plaintiffs in that first action must be enjoined, but suit on same issue and subject matter against corporation that was not party to first suit must be allowed to continue); *Carbide & Carbon Chem. Corp. v. United States Indus. Chem. Co.*, *supra* note 44, 140 F. 2d at 49 (same parties in both suits); *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F. 2d 403, 405 (5th Cir. 1971) (de-

could have had his claim resolved in one court, it would be senseless to allow some of the parties to initiate concurrent litigation over the same dispute. But that is not this case. Some—at least appellants—with a stake in the controversy were not before the Delaware court, and accordingly the principle of comity is inapplicable.[47] Even if comity might be thought at all relevant, it would not outweigh the non-parties' right, guaranteed by the Act[48] and the Constitution,[49] to have their claims adjudicated.

III. Accommodating FOIA and Reverse-FOIA Suits.

The sum of the foregoing is that none of the familiar anti-relitigation doctrines operates to deprive nonparty requesters of their right to sue for enforcement of the Freedom of Information Act; rather, they remain unaffected by prior litigation solely between the submitters and the involved agency. One obvious consequence is that federal agencies that are prey to reverse-FOIA suits may

46. (Cont'd.)
fendants in first suit brought subsequent action); *Martin v. Graybar Elec. Co.*, 266 F. 2d 202, 204 (7th Cir. 1959) (both suits involved the same parties and issues); *American Chem. Paint Co. v. Thompson Chem. Corp.*, 244 F. 2d 64, 65-66 (9th Cir. 1957) (same plaintiffs in all suits); *O'Hare Internat'l Bank v. Lambert*, 459 F. 2d 328, 330 (10th Cir. 1972) (identical actions brought by same party). See also, *e.g.*, *Will v. Calvert Fire Ins. Co.*, — U. S. —, —, 98 S. Ct. 2552, 2555, 57 L. Ed. 2d 504, 508 (1978) (same parties and issue in state and federal court suits); *Colorado River Water Conservation Dist. v. United States*, *supra* note 45, 424 U. S. at 806, 96 S. Ct. at 1240-1241, 47 L. Ed. 2d at 491 (same); *Brillhart v. Excess Ins. Co.*, 316 U. S. 491, 494-495, 62 S. Ct. 1173, 1175-1176, 86 L. Ed. 1620, 1625 (1942) (same); *Rickey Land & Cattle Co. v. Miller & Lux*, 218 U. S. 258, 263, 31 S. Ct. 11, 13-14, 54 L. Ed. 1032, 1038-1039 (1910) (plaintiff in subsequent state suit was a corporation utilized merely as a device by defendant in first federal suit).

47. *Robertson v. Department of Defense*, *supra* note 35, 402 F. Supp. at 1346, citing *Great N. Ry. Co. v. National R. R. Adjustment Bd.*, 422 F. 2d 1187, 1193 (7th Cir. 1970).

48. See 5 U. S. C. § 552(a)(4)(B) (1976).

49. See text *infra* at notes 60-61.

by that token find themselves subject to the possibility of inconsistent judgments. Threats of that nature are not unprecedented, however, and there are procedural devices aplenty designed to avoid the hazard of conflicting obligations.[50] Resort to them in the present context, moreover, would have brought about representation of all interests before the court that first addressed the merits, and thereby would have eliminated the problem completely.

Another consequence is that reverse-FOIA plaintiffs may find that, to prevent judgments in their favor from becoming nugatory, they must join in their lawsuits anyone whose request for information quickened the submitter's controversy with the agency[51]—or perhaps even, by way of a defendant class action, all those who likely may subsequently make such requests. That, too, can only be salutary, for it will assure that the public's interest will be represented by at least one of its own. It will also relieve courts of the temptation—to which we earlier succumbed—to undertake a critique of the agency's litigative strategy.[52]

The manufacturer-plaintiffs could have named appellant-requesters as defendants in the Delaware lawsuit, or they could have maintained it as a defendant class action against the Commission and all possible requesters.[53]

50. See, *e.g.*, *Metropolitan Life Ins. Co. v. Usery*, 426 F. Supp. 150, 155 (D. D. C. 1976) (transfer and consolidation of FOIA and reverse-FOIA suits); *Fisher v. Renegotiation Bd.*, 355 F. Supp. 1171 (D. D. C. 1973) (reverse-FOIA advocate permitted to intervene as of right in FOIA suit). See also text *infra* at notes 53-56.

51. Joining the requester may constrain the reverse-FOIA plaintiff's choice of venue. See 28 U. S. C. A. § 1391(e) (1977 Supp.). See also 5 U. S. C. § 552(a)(4)(B) (1976), discussed in notes 66 and 71 *infra*.

52. See *Consumers Union v. Consumer Prod. Safety Comm'n*, *supra* note 4, 182 U. S. App. D. C. at 356-357, 561 F. 2d at 354-355.

53. See *United States v. Trucking Employers, Inc.*, 75 F. R. D. 682, 686-687 (D. D. C. 1977); Fed. R. Civ. P. 23(a) ("[o]ne or more members of a class may sue or be sued as representative

They did not. The Commission, with some creativity, could have filed an interpleader counterclaim and joined the requesters on the theory that otherwise the Commission might be exposed to multiple accountability and that, in a dispute over disclosure, information is an indivisible res over which the parties contest.[54] It did not. At the very least, the Commission could have urged that the requesters were parties whose joinder was required under Civil Rule 19.[55] But no consideration was given to the mandates of that rule,[56] though, as we now elucidate, its applicability could hardly have been questioned.

If, as the manufacturers and the Commission assert, the Delaware reverse-FOIA suit so affected appellants' interest in disclosure of the information sought that they are now barred from litigating it in the District Court here, the Delaware action certainly could have been said, in the words of Rule 19, "as a practical matter [to] impede [their] ability to protect that interest or . . . [to] leave [the agency] subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [appellants'] claimed interest." [57]

53. (Cont'd.)
parties on behalf of all" if certain prerequisites are met). See generally Wolfson, *Defendant Class Actions*, 38 Ohio St. L. J. 459 (1977); Note, *Defendant Class Actions*, 91 Harv. L. Rev. 630 (1978).

54. See Fed. R. Civ. P. 22; Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966); *cf. Gauss v. Kirk*, 91 U. S. App. D. C. 80, 83, 198 F. 2d 83, 86 (1952).

55. Fed. R. Civ. P. 19.

56. Indeed, though any court may—and should, if justified—examine the issue of Rule 19 *sua sponte*, the Commission refused to consent to the filing of the requesters' amicus brief raising the question on the appeal to the Third Circuit of the Delaware court's ruling. See note 12 *supra*. The Third Circuit granted leave to file the brief, however.

57. Fed. R. Civ. P. 19(a). The possible difficulty that reverse-FOIA plaintiffs might not know the identities of all present or future requesters can be ameliorated by joining any known requesters as representatives of a defendant class. See note 53 *supra*.

Indeed, the concept of joinder was created to resolve the problem of conflicting exercise of equity jurisdiction.[58] Rule 19(b) states the considerations that must guide a determination whether one described by Rule 19(a) must be regarded as so indispensable that the litigation must be dismissed. Those factors include

> first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

In our view, those factors, had anyone in the Delaware action paused to look at them, surely demanded dismissal of the manufacturers' Delaware suit, or at least an injunction shaped to impact to the smallest possible extent upon the absent requesters' interest.

Joinder of the requesters would have been the better course, for it would have avoided the duplicative litigation in which we now are unfortunately entangled, but it was not the only solution. A well-crafted judgment in Delaware could have steered clear of any embarrassment to appellants' claim. Indeed, the inherent tension between

58. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U. S. 102, 120, 88 S. Ct. 733, 743-744, 19 L. Ed. 2d 936, 950-951 (1968). Rule 19 also helps "to make it perfectly certain that no injustice is done, either to the parties before it, or to others who are interested in the subject matter, by a decree which might otherwise be granted upon a partial view only of the real merits." *Minnesota v. Northern Sec. Co.*, 184 U. S. 199, 235, 22 S. Ct. 308, 322, 46 L. Ed. 499, 516 (1902).

reverse-FOIA and FOIA suits could often be mitigated by a rule that, unless the party resisting disclosure joins in his reverse-FOIA suit those seeking release, any injunction therein must be drafted to halt only voluntary disclosure by the agency, and to leave unaffected the requesters' right to seek a subsequent judicial determination that the Act mandates disclosure.[59]

IV. Conclusion.

Appellant requesters were not made parties to the Delaware action, and the effect of that omission on this litigation is, to us, indisputable. A judgment cannot bind those who were not before the court either in person or through some sort of representative.[60] As the Supreme Court has declared, in dealing with situations where "a final decision cannot be made between the parties litigant without directly affecting and prejudicing the rights of others not made parties . . . , no Court can adjudicate directly upon a person's right, without the party being

59. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 112 n. 10, 88 S. Ct. at 739, n. 10, 19 L. Ed. 2d at 946 n. 10 (the pertinent questions are "[c]an the decree be written so as to protect the legitimate interests of outsiders and, if so, would such a decree be adequate to the plaintiff's needs and an efficient use of judicial machinery"). We need not reach the question whether by similar reasoning requesters must always join submitters as defendants in their FOIA suits, for appellants here have done so in their complaint.

60. *Hansberry v. Lee, supra* note 38, 311 U. S. at 40-41, 45, 61 S. Ct. at 117-118, 119-120, 85 L. Ed. at 26-27, 29; see *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[o]f course, since the outsider is not before the court, he cannot be bound by the judgment rendered"); *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co., supra* note 46, 342 U. S. at 186, 72 S. Ct. at 222, 96 L. Ed. at 204 ("[i]f the patentee's suit against a customer is brought in a district where the manufacturer cannot be joined as a defendant, the manufacturer may be permitted simultaneously to prosecute a declaratory action against the patentee elsewhere").

either actually or constructively before the Court."[61] This basic tenet of due process can hardly be circumvented through the ritualistic invocation of "comity." The manufacturers have no valid objection to relitigation of disclosure of this information, "for clearly the plaintiff [in the earlier suit], who himself chose the forum and the parties defendant, will not be heard to complain about the sufficiency of the relief obtain[ed] against them."[62] Nor can the Commission legitimately bemoan the threat of inconsistent obligations since it never attempted to foreclose that possibility by seeking the joinder of appellants in Delaware.[63]

61. *Mallow v. Hinde,* 25 U. S. (12 Wheat.) 193, 198, 6 L. Ed. 599, 600 (1827), quoted with approval in *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 122, 88 S. Ct. at 744, 19 L. Ed. 2d at 952. See also *Western Union Tel. Co. v. Pennsylvania,* 368 U. S. 71, 74-75, 82 S. Ct. 199, 201, 7 L. Ed. 2d 139, 142-143 (1961) (forced relinquishment of property interest without assurance that holder will not be held liable again to another in another court violates due process, "and, of course, New York's claims could not be cut off where New York was not heard as a party").

62. *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 111, 88 S. Ct. at 739, 19 L. Ed. 2d at 946; see *Boles v. Greenville Housing Auth.,* 468 F. 2d 476, 479 (6th Cir. 1972) ("[a]ny hardship suffered . . . is attributable to their own failure to bring [an interested person] into the case as a party"). It is no answer to say that a plaintiff normally is allowed to choose how to write his complaint:

> The plaintiff has the right to "control" his own litigation and to choose his own forum. This "right" is, however, like all other rights, "defined" by the rights of others. Thus the defendant has the right to be safe from needless multiple litigation and from incurring avoidable inconsistent obligations. Likewise the interests of the outsider who cannot be joined must be considered. Finally there is the public interest and the interest the court has in seeing that insofar as possible the litigation will be both effective and expeditious.

Schutten v. Shell Oil Co., 421 F. 2d 869, 873 (5th Cir. 1970).

63. See *Provident Tradesmens Bank & Trust Co. v. Patterson, supra* note 58, 390 U. S. at 110, 88 S. Ct. at 738, 19 L. Ed. 2d at 945 ("[a]fter trial, however, if the defendant has failed to assert

The only factor even remotely capable of preventing appellants from prosecuting their FOIA suit toward a result contrary to the broad Delaware reverse-FOIA injunction is their failure to intervene in the proceeding there.[64] We believe, however, that appellants, and perhaps information-requesters generally, should not suffer from bypasses of this sort. To decide otherwise would force them to accept the choice of a forum possibly sympathetic to the submitter and surely inconvenient or impossible for the requester.[65] Congress specified the sites

63. (Cont'd.)
this interest [against inconsistent relief], it is quite proper to consider it foreclosed"). Had the Commission raised the issue in a timely fashion, the Delaware court expectably would either have ordered joinder, modified the relief ultimately granted or dismissed the action. The Supreme Court has instructed that if "[a]mong the unpleasant possibilities entailed by proceeding [is] the likelihood that the defendant might find itself subject to directly conflicting injunctive orders . . . 'the court must refuse to exercise jurisdiction . . . or become the instrument of injustice.'" *Id.* at 123, 88 S. Ct. at 745, 19 L. Ed. 2d at 952, quoting *Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co.*, 56 U. S. (15 How.) 233, 246, 14 L. Ed. 674, 681 (1854).

64. See *Provident Tradesmens Bank & Trust Co. v. Patterson*, *supra* note 58, 390 U. S. at 114, 88 S. Ct. at 740, 19 L. Ed. 2d at 947-948 (reversing this question). Compare *Developments in the Law—Multiparty Litigation in Federal Courts*, 71 Harv. L. Rev. 874, 882-883 (1958) with *id.* at 884-885. Preclusion based on the failure to intervene would be proper, if at all, only where the putative intervenor had timely notice of the litigation.

65. For example, in *Westinghouse Elec. Corp. v. Schlesinger*, *supra* note 24, one requesting party was the Legal Aid Society of Alameda County, California, but the reverse-FOIA suit was litigated in Virginia, where the requester felt it necessary to intervene. The inconvenience of cross-country intervention is magnified by the familiar rule that "an intervenor generally is held to have waived his privilege to change the venue of a suit." *Commonwealth Edison Co. v. Train*, 71 F. R. D. 391, 394 (N. D. Ill. 1976), citing *TWA v. CAB*, 339 F. 2d 56, 64 (2d Cir. 1964), *cert. denied*, 382 U. S. 842, 86 S. Ct. 40, 15 L. Ed. 2d 82 (1965) and 3B, Moore's Federal Practice § 24.19 (2d ed. 1975).

proper for judicial consideration of FOIA claims;[66] to allow submitters to force FOIA litigation[67] to occur in other arenas would free the tail to wag the dog.[68]

This, in our opinion, is the type of "undue hardship" expressly discountenanced by the Advisory Committee when it discussed amended Rule 19 in 1966.[69] The rule puts the burden on existing parties and the court to bring in those whose presence is necessary or desirable, and to work out a fair solution when joinder is jurisdictionally impossible.[70] A generally applicable theory of waiver by one who declines to voluntarily step into the proceeding would abrogate the rule and its purpose completely. It is the party's —not the nonparty's—responsibility to make certain that the court has before it all those needed to enable it to serve the ends of justice. And if the essential nonparty cannot, for reasons of personal jurisdiction, be joined in the suit, then the litigation must proceed elsewhere, if at all.[71]

This case, therefore, must finally continue toward a decision on the merits in the District Court for the District

66. The Freedom of Information Act specifies "the district court of the United States in the district in which the complainant [requester] resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia" as the courts in which enforcement of the Act can properly be sought. 5 U. S. C. § 552(a)(4)(B) (1976).

67. As noted earlier, notes 29-30 *supra* and accompanying text, a court analyzing the merits of reverse-FOIA litigation must surely determine the applicability of the disclosure demands of the Act.

68. *Cf. State Farm Fire & Cas. Co. v. Tashire*, 386 U. S. 523, 535, 87 S. Ct. 1199, 1206, 18 L. Ed 2d 270, 278 (1967).

69. Advisory Committee's Note to Fed. R. Civ. P. 19, reprinted in 39 F. R. D. 89, 92 (1966).

70. See *Ricci v. State Bd. of Law Examiners*, 569 F. 2d 782, 784 (3d Cir. 1978); Fed. R. Civ. P. 19(a).

71. Congress specified that the applicability of the Freedom of Information Act be litigated in the requester's district or in other designated areas, but made no provision at all for venue in the submitter's "home court." See note 66 *supra*.

of Columbia. Its first task is to analyze closely the Delaware court's reasoning, for it may turn out that the court here will agree with the Delaware court. Should, however, the court decide that the failure to release the information was indeed improper, it will have to ascertain the relief appropriate in the circumstances. Since the manufacturers are party-defendants, it might consider enjoining them from enforcing their Delaware judgment against the Commission.[72] In short, our decision is a narrow one—that this litigation is not prohibited by the earlier action—and we have not attempted to decide whether or not actual disclosure should be the final result.

Remanded.

72. Compare *Steelman v. All Continent Corp.*, 301 U. S. 278, 291, 57 S. Ct. 705, 710-711, 81 L. Ed. 1085, 1093 (1937) with *Lapin v. Shulton, Inc.*, 333 F. 2d 169, 172 (9th Cir.), *cert. denied*, 379 U. S. 904, 85 S. Ct. 193, 13 L. Ed. 2d 77 (1964).

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC.,
PUBLIC CITIZEN'S HEALTH RESEARCH GROUP,
Plaintiffs,

v.

CONSUMER PRODUCT SAFETY COMMISSION,
RICHARD O. SIMPSON,
BARBARA H. FRANKLIN,
LAWRENCE KUSHNER,
CONSTANCE NEWMAN,
R. DAVID PITTLE,
SADYE DUNN,
GTE SYLVANIA, INC.,
RCA CORPORATION,
THE MAGNAVOX COMPANY,
ZENITH RADIO CORPORATION,
MOTOROLA, INC.,
WARWICK ELECTRONICS, INC.,
AERONUTRONIC FORD CORPORATION,
MATSUSHITA ELECTRIC CORPORATION
OF AMERICA,
SHARP ELECTRONIC CORPORATION,
TOSHIBA OF AMERICA, INC.,
GENERAL ELECTRIC COMPANY,
ADMIRAL CORPORATION.

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF.

1. This is an action under the Freedom of Information Act, as amended, 5 U. S. C. § 552 ("the Act"), by consumer organizations seeking an opportunity to inspect and/or copy documents in the possession of the Consumer Product Safety Commission concerning television-related accidents.

2. This Court has jurisdiction over the subject matter of this Complaint pursuant to 5 U. S. C. § 552(a)(3); 5 U. S. C. § 702; and 28 U. S. C. § 2201-02. Venue is properly laid in this district pursuant to the Act, 5 U. S. C. § 552(a)(3).

3. Plaintiff Consumers Union of United States, Inc. ("Consumers Union"), with several hundred thousand members, many of whom are owners or prospective owners of televisions which are or may be hazardous, is the largest consumer organization in the United States. It was organized in 1936 as a nonprofit organization under the laws of the State of New York to provide information, education and counsel on consumer goods and services. Consumers Union publishes *Consumer Reports*, a monthly magazine of consumer information with a paid circulation of more than 2 million readers. Consumers Union tests and rates consumer products, including televisions, and gathers other information relating to the performance, including safety performance, of these products. *Consumer Reports* regularly carries, and plans to carry in the future, articles reflecting such testing and rating of televisions.

Plaintiff Public Citizen is a nonprofit organization supported by voluntary donations from individuals, many of whom are owners or potential owners of television sets which are or may be hazardous. Public Citizen funds

the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

4. Defendant Consumer Product Safety Commission ("the Commission") is an independent regulatory commission established pursuant to the Consumer Product Safety Act of 1972, 15 U. S. C. § 2051 *et seq.*

Defendant Richard O. Simpson is Chairman of the Commission.

Defendants Barbara Franklin, Lawrence Kushner, Constance Newman, and R. David Pittle are Commissioners of the Commission.

Defendant Sadye Dunn is the Secretary of the Commission and the official designated by the Interim Freedom of Information Guidelines of the Commission to bear ultimate responsibility for responding to requests for records. (39 Fed. Reg. 30299, August 21, 1974).

Defendants GTE Sylvania, Inc., RCA Corporation, The Magnavox Company, Zenith Radio Corporation, Motorola, Inc., Warwick Electronics, Inc., Aeronutronic Ford Corporation, Matsushita Electric Corporation of America, Sharp Electronics Corporation, Toshiba of America, Inc., General Electric Company, and Admiral Corporation are each corporations which manufacture television equipment and do business in the District of Columbia. Said defendants are hereinafter referred to collectively as "defendant corporations."

5. By separate letters dated June 14, 1974, plaintiffs each requested from defendant Commission under authority of the Act, an opportunity to inspect and/or copy documents relating to the safety of television sets, which documents were submitted by defendant corporations to the Commission in response to the Commission's Special Orders ("Special Orders") dated May 13, 1974.

In oral conversations, plaintiffs, defendant Dunn and other representatives of the defendant Commission agreed to extend the request to documents submitted by defendant corporations in response to Commission subpoenas directed to the defendant corporations and dated July 26, 1974.

6. Subsequently, plaintiffs limited their request to include only (a) the aforesaid submitted documents concerning television-related accidents and (b) documents resulting from Commission processing of such submitted documents, but excluding (1) legal correspondence which is within the attorney-client relationship or the attorney work product doctrine, and (2) the names and addresses of accident victims. Documents embraced within this limited request are hereinafter referred to as "the requested documents."

7. On November 5, 1974, following various efforts by plaintiffs to obtain Commission action on their requests, plaintiffs, defendant Dunn and other employees of the Commission met to discuss the status of plaintiffs' request, at which meeting plaintiffs protested defendant Commission's refusal, based upon blanket claims of confidentiality asserted by the defendant corporations, to disclose the requested documents. Commission representatives responded that a legal determination as to the availability of the requested documents for which claims of confidentiality had been advanced would be completed by mid-March 1975. By letter dated November 18, 1974, plaintiffs acquiesced to this timetable, but expressly reserved the right to consider additional delay as constituting a denial of their request.

8. On March 28, 1975, defendant Commission determined, *inter alia,* that the requested documents do not constitute exempt information under the Act, 5 U. S. C. § 552(b), and that even if the data could be considered exempt, disclosure is appropriate in the interest of public health and safety.

9. By letter dated April 8, 1975, defendant Commission notified defendant corporations of the Commission's decision to release the requested documents. By telegram of April 17, 1975 (and correction of April 21, 1975), the Commission notified defendant corporations that no requested documents would be released until May 1, 1975.

10. By filing separate actions on or after April 22, 1975, in the United States District Court for the District of Delaware, defendants GTE Sylvania, Inc. (Civil Action 75-104), RCA Corporation (Civil Action 75-108), The Magnavox Company (Civil Action 75-112), Zenith Radio Corporation (Civil Action 75-113), Motorola, Inc. (Civil Action 75-114), Warwick Electronics, Inc. (Civil Action 75-115), and Aeronutronic Ford Corporation (Civil Action 75-116) have sought injunctions against disclosure, *Inter alia,* of the requested documents.

By filing separate actions on or after April 22, 1975, in the United States District Court for the Southern District of New York, defendants Matsushita Electric Corporation of America (Civil Action 75-2040), Sharp Electronic Corporation (Civil Action 75-2049), and Toshiba of America, Inc. (Civil Action 75-2050) have sought injunctions against disclosures, *inter alia,* of the requested documents.

Defendant General Electric Company filed suit (Civil Action 75-CV-189) in the United States District Court for the Northern District of New York seeking an injunction against disclosure, *inter alia,* of the requested documents.

Defendant Admiral Corporation (Civil Action 75-531) filed suit in the United States District Court for the Western District of Pennsylvania seeking an injunction against disclosure, *inter alia,* of the requested documents.

11. Defendant corporations applied for temporary restraining orders prohibiting disclosure of the requested documents in each of the actions described in paragraph 10 hereof. In each case, the Commission has consented to said applications and as a result, temporary restraining orders have been entered in each case for periods of up to 60 days, and disclosure of the requested documents to plaintiffs has thereby been prevented.

12. By letter dated April 28, 1975, plaintiff Consumers Union notified defendant Commission and defendant Dunn that the Commission's action in consenting to such a temporary restraining order would be deemed a denial of plaintiffs' rights to the requested documents and that plaintiffs would seek their remedy in court.

13. The requested documents are subject to mandatory disclosure under the Act, and the continued and prolonged withholding of such documents by defendant Commission, including its consent to applications by defendant corporations for said temporary restraining orders violates the Act. Plaintiffs have been and are irreparably harmed thereby and lack an adequate remedy at law.

WHEREFORE, plaintiffs pray:

(1) that this Court declare that the requested documents must be made immediately available to plaintiffs for inspection and/or copying;

(2) that this Court permanently enjoin defendant Commission and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying of the requested documents;

(3) that this Court expedite these proceedings;

(4) that this Court award plaintiffs their costs and disbursements in this action, including reasonable counsel fees; and

(5) that this Court grant such other relief as the Court may deem just and proper.

Respectfully submitted,

[Signatures of Counsel Deleted]

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 11, 1975

Opinion.

RICHEY, *District Judge.*

Plaintiffs Consumers Union of United States, Inc., and Public Citizens' Health Research Group filed this action on May 5, 1975, seeking access under the Freedom of Information Act, 5 U. S. C. § 552, to certain reports on television accidents submitted to the Consumer Product Safety Commission (CPSC) by various television manufacturers. The defendants in this case are the CPSC, its Chairman, Commissioners, and Secretary; and twelve television manufacturers which submitted the reports in question. The plaintiffs seek relief in the following form: (a) a declaration that the requested documents, currently in possession of the CPSC, must be made immediately available to the plaintiffs for inspection and/or copying; and (b) an injunction enjoining the CPSC and its agents and employees from failing to make the requested documents immediately available to plaintiffs for inspection and/or copying.

The case is currently before the Court on the motions of ten television manufacturers to dismiss or, in the alternative, to stay these proceedings.[1] The defendants claim that with respect to the Government, the complaint fails to present a "case or controversy" within the meaning of Article III, section 2 of the United States Constitution,[2] and that with respect to the manufacturers the complaint fails to state a claim upon which relief can be granted. The defendant-manufacturers also claim that because a similar action involving virtually the same issues is pending in the United States District Court for the District of Delaware, this action should be dismissed in the interests of comity and judicial economy.

I. Background.

A somewhat complex course of events provides the background for this action. In May, 1974, the CPSC issued special orders to television manufacturers requesting that they submit, *inter alia,* all accident reports collected by the manufacturers since the National Commission on Product Safety held certain hearings in 1969. The CPSC also invited the manufacturers to indicate which, if any, of the reports they submitted were, in the manufacturers' view, entitled to exemption from disclosure under the Freedom of Information Act (FOIA). In June, 1974, plaintiffs herein requested access, under the FOIA, to the documents submitted by the manufacturers in response to the CPSC's orders of the previous month. While the

1. Defendants Admiral, Aeronutronic Ford, General Electric, GTE Sylvania, Magnavox, RCA, Sharp, Toshiba, Warwick, and Zenith have so moved. The remaining defendants, Motorola, Matsushita, and the CPSC, have in effect so moved by praying for dismissal in their answers to the plaintiffs' complaint.

2. The federal defendant has also, in effect, so moved. See note 1, *supra,* and Answer of the Consumer Product Safety Commission at "First Defense".

plaintiffs were given access to those reports for which confidentiality was not claimed by the manufacturers, the plaintiffs were not immediately afforded access to the documents which the manufacturers claimed were exempt from the FOIA. Instead, the CPSC, in August, 1974, informed the manufacturers of the plaintiffs' FOIA request and directed the manufacturers to substantiate their claims of confidentiality. In the meantime, the CPSC had determined, in July, 1974, that the manufacturers' response to its first request for documents was not complete; the CPSC ordered the manufacturers to make further submissions and extended the plaintiffs' FOIA request to the additional data submitted by the manufacturers. Plaintiffs subsequently limited their request to exclude documents protected by the attorney-client privilege or the work-product doctrine and those portions of documents which contained the names and addresses of accident victims.

With their request still unanswered, plaintiffs informed the CPSC in October, 1974, that any further delay would be considered by the plaintiffs as a denial of their request under the FOIA. As a result of that communication, representatives of the plaintiffs and the CPSC met in November, 1974, and agreed upon a timetable for the completion of CPSC's review of the voluminous submissions. It was estimated that the CPSC's legal determination as to the availability of the requested documents would be completed by mid-March of 1975. Plaintiffs acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.

On March 28, 1975, the CPSC issued its legal determination that the documents requested by the plaintiffs did not fall within the exemptions of the FOIA and that, even if the data were exempt, disclosure by the CPSC was

nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety. The CPSC subsequently notified the television manufacturers of its decision to release the requested documents and of its intention to withhold disclosure until May 1, 1975. Upon said notice, seven of the defendant television manufacturers filed separate actions against the CPSC in the United States District Court for the District of Delaware,[3] each seeking an injunction prohibiting disclosure on the grounds that the release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq*. Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[4] the United States District Court for the Northern District of New York,[5] and the United States District Court for the Western District of Pennsylvania.[6] In all of the actions, the manufacturers applied for temporary restraining orders prohibiting the release of the documents pending determination of their motions for preliminary injunction. The CPSC consented to the temporary restraining order in at least some of the cases.[7]

3. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (C. A. No. 75-104), RCA (C. A. No. 75-108), Magnavox (C. A. No. 75-112), Zenith, (C. A. No. 75-113), Motorola (C. A. No. 75-114), Warwick (C. A. No. 75-115), and Aeronutronic Ford (C. A. No. 75-116).

4. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049), and Toshiba (C. A. No. 75-2050), filed actions in the Southern District of New York.

5. General Electric (75-CV-189) filed suit in the Northern District of New York.

6. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

7. The plaintiffs claim that the agency consented to the orders in all of the cases filed by the manufacturers. Plaintiffs' complaint at ¶ 11. The CPSC claims that it consented to some but not all of

The instant action was filed on May 5, 1975. Subsequently, the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[8] Oral arguments on the preliminary injunction motion in the consolidated cases were heard by Chief Judge Latchum in July, 1975. The documents in question in both this action and the consolidated cases in Delaware remain in the possession of the CPSC and subject to the above-mentioned restraining orders pending Judge Latchum's decision on the motion for preliminary injunction.[9]

II. No Case or Controversy Exists Between Plaintiffs and the CPSC.

Plaintiffs invoke the jurisdictional sections of the FOIA, 5 U. S. C. § 552(a)(3), and the Administrative Procedure Act, 5 U. S. C. § 702, as bases for this Court's jurisdiction in this case.[10] Both statutes pertain to actions against federal agencies. In this case, plaintiffs seek an order instructing the agency to provide plaintiffs access to the documents in question for inspection and/or copying. At the heart of plaintiffs' claim is their contention that the documents are subject to mandatory disclosure under

7. (Cont'd.)
the orders. Answer of the Consumer Product Safety Commission at ¶ 11. For purposes of this motion to dismiss, plaintiffs' allegations are taken as true.

8. *In re: Consumer Product Safety Commission Litigation*, Civil Action Nos. 75-104, 75-108, 75-112, 75-113, 75-114, 75-115, 75-116, 75-122, 75-131, 75-136, 75-150, 75-151, 75-152 (D. Del.).

9. The statement of facts above is drawn from all of the substantive pleadings in this case.

10. Plaintiffs also invoke the Declaratory Judgment Act, 28 U. S. C. § 2201-02, as a ground for this Court's jurisdiction, plaintiffs' complaint at ¶ 2. The Declaratory Judgment Act is not, however, a statute which confers jurisdiction. See, *e.g.*, *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U. S. 667 (1950).

the FOIA.[11] The defendant agency, however, came to the exact same conclusion in its above-mentioned formal finding of March 28, 1975. The CPSC and the plaintiffs thus stand in the same position on the crucial issue in this case.

The Constitution extends federal courts' jurisdiction only to specified cases and controversies.[12] Implicit in the "case and controversy" doctrine is the requirement that litigation must arise "between adverse litigants." *Muskrat v. United States*, 219 U. S. 346, 361 (1911); *Aetna Life Insurance Co. v. Hawarth*, 300 U. S. 227 (1937). Where opposing litigants desire "the same result," as here, there is "no case or controversy within the meaning of Art. III of the Constitution." *Moore v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 47, 48 (1971); *General Electric Co. v. Bootz Mfg. Co.*, 289 F. Supp. 504 (D. Ind. 1968). This Court is faced with the prospect in the instant action that both the plaintiffs and the CPSC will submit briefs urging the same conclusion as to the availability of the documents under the FOIA. In such a posture, this case does not present a question "in an adversary context," as required by the Constitution. *Flast v. Cohen*, 392 U. S. 83, 95 (1968).

Plaintiffs contend, however, that the "controversy" which they present as between themselves and the agency centers on the agency's failure to contest the temporary restraining orders issued in the now-consolidated cases brought by the manufacturers. According to the plaintiffs, the agency's failure to contest the orders constituted a violation of the agency's duty under the FOIA to speedily deliver the documents in question once a determination

11. See plaintiffs' complaint at ¶ 13.

12. U. S. Const., art. III, § 2. See *Golden v. Zwickler*, 394 U. S. 103 (1969); *Baker v. Carr*, 369 U. S. 186 (1969).

was made that such documents were subject to disclosure. Plaintiffs also allege that the agency's failure to contest the orders reflects a certain lack of good faith toward the plaintiffs.

As an initial matter, this Court notes, admittedly without having all of the facts before it,[13] that it does seem curious that the agency, having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining orders. However, regardless of any possible impropriety on the agency's part, its failure to contest the motions does not present a "controversy" between plaintiffs and the CPSC in this case. Plaintiffs do not ask for a mere declaration that the agency "shouldn't have" consented to the orders—it is doubtful, in fact, that such a "wrong" would be actionable. Plaintiffs ask instead that the agency be ordered to release the documents to the plaintiff, and a decision to that effect made by this Court would necessarily entail a determination that the documents are subject to disclosure under the FOIA. As discussed above, there is no adversity between the agency and the plaintiffs, and thus no case or controversy, with respect to the FOIA issue.

Plaintiffs point to the case of *Robertson v. Department of Defense*, Civil No. 74-644 (D. D. C., June 19, 1975), in support of their claim that a controversy exists in the instant action. *Robertson* involved a very similar fact situation to this case. The General Motors Corporation had submitted certain documents to the Department of Defense which Robertson subsequently requested, for purposes of inspection, under the FOIA. The Department determined that some *but not all* of the documents were

13. See note 7, *supra*.

subject to FOIA disclosure. General Motors thereupon sued the Department and other federal defendants in the United States District Court for the Eastern District of Virginia, seeking an injunction against the disclosure of the documents. Robertson countered by filing an FOIA suit against the Department and General Motors in this Court. In allowing the plaintiff to maintain suit, Judge Barrington D. Parker pointed out what is, for purposes of the instant case, the crucial characteristic of *Robertson*: "[I]n the Virginia proceeding and in the matter before this Court, the government has never taken the position espoused by Robertson—that the documents, in their entirety, are obtainable under the Act." Memorandum Opinion of June 19, 1975, at 8. In *Robertson*, unlike the instant action, there were areas of disagreement between the plaintiff and the governmental defendant.[14]

In essence, what the plaintiffs ask this Court to do in the instant case is to re-determine whether the restraining orders obtained by the manufacturers in various federal district courts should have issued. It is true that the CPSC consented to the various orders. Nonetheless, it was the responsibility of each court—and this Court cannot but assume that said responsibility was met—to make an independent determination that an order was justified. See, *e.g.*, Judge Latchum's Temporary Restraining Order of April 23, 1975, in *RCA Corp. v. United States Consumer Product Safety Commission*, Civil No. 75-108 (D. Del. filed April 22, 1975). As the United States Court of Ap-

14. Plaintiffs also question the genuineness of the agency's conclusion on the FOIA issue: "[E]ven if the Commission should prevail in the Delaware action, it could then decide as a discretionary matter to refuse to disclose the data to plaintiffs." Plaintiffs' Motion for Summary Judgment at 43 n. * *. But the agency has assured the Court on the public record that "disclosure will be made as soon as the federal defendants are not enjoined from doing so." CPSC's Answer at ¶ 13.

peals for the District of Columbia Circuit has noted, "in the interests of comity and the orderly administration of justice we should not attempt to reexamine . . . matters considered and resolved by . . . a court having authority equal to our own." *Hilton Hotels Corp. v. Weaver,* 325 F. 2d 1010 (1963), *cert. denied,* 376 U. S. 951 (1964) (footnote omitted).

III. Plaintiffs' Complaint Fails to State a Claim Against the Defendant-Manufacturers Upon Which Relief Can Be Granted.

As noted above, this case is brought under the FOIA and the Administrative Procedure Act. Those statutes entitle a claimant to relief against federal agencies and, accordingly, plaintiffs' complaint is styled to request relief from inaction by the CPSC. Plaintiffs have also named twelve television manufacturers as defendants in this case, but no relief is requested from the manufacturers. Indeed, the manufacturers are in no position to provide relief inasmuch as the documents in question are in the possession of the agency. Thus, as to the defendant-manufacturers, plaintiffs "can prove no set of facts in support of [their] claim which would entitle them to relief." *Conley v. Gibson,* 355 U. S. 41, 45-46 (1957). The defendant-manufacturers would thus seem to be entitled to dismissal under Fed. R. Civ. P. 12(b)(6) because of plaintiffs' failure to state a claim upon which relief can be granted.

Plaintiffs maintain, however, that because the defendant-manufacturers have such a strong interest in the outcome of this litigation, they are subject to suit under the compulsory joinder provision of Fed. R. Civ. P. 19(a). Assuming *arguendo* that Rule 19(a) could be so employed in the current litigation, the plaintiffs would nonetheless be faced with an uncleared hurdle: lack of jurisdiction.

As noted in the preceding section, there is no case or controversy between plaintiffs and the federal defendant. Lack of a case or controversy is a jurisdictional defect. See *Aetna Life, supra; Tilley Lamp Co. v. Thacker,* 454 F. 2d 805, 808 (5th Cir. 1972). Plaintiffs have suggested that "even assuming *arguendo* that no live case or controversy existed between plaintiffs and the Commission, nothing is clearer than that a very live case or controversy exists between plaintiffs and the manufacturers." Plaintiffs' Motion for Summary Judgment at 35. Plaintiffs would thus provide the missing jurisdictional ingredient of case or controversy by joining, under Rule 19(a), the defendant-manufacturers who certainly possess an interest adverse to plaintiffs' in this litigation. The plaintiffs' solution is ingenious but unfortunately not authorized by Rule 19, which is "predicated upon the preexistence of federal jurisdiction over the cause of action . . ." *Letmate v. Baltimore and Ohio R. R.,* 311 F. Supp. 1059, 1062 (D. Md. 1970). Rule 19 canot be used "in a way that would extend the subject matter jurisdiction of the Federal courts; indeed, Rule 82 precludes any construction of the Rule that would have such an effect." 7 Wright and Miller, *Federal Practice and Procedure* § 1602, at 20 (footnote omitted); see also *Anderson v. United States,* 217 F. Supp. 814 (E. D. Pa. 1963).

IV. Conclusion.

Plaintiffs' complaint must therefore be dismissed for failure to present a case or controversy as to the federal defendant and failure to state a claim upon which relief can be granted as to the defendant-manufacturers.[15] In

15. Defendant-manufacturer Warwick has moved for dismissal on the additional grounds that this Court lacks personal jurisdiction over Warwick. In view of the Court's disposition of this case, it is unnecessary to consider Warwick's motion.

reaching this conclusion, the Court notes that it is especially reluctant to bar the courthouse door when the plaintiff is, as in the instant case, a representative of the public interest. But the Constitution demands no less, considering the present posture of this case.

The Court is aware of the possibility that plaintiffs failed to intervene in the Delaware proceedings in the hope that this Court would assume jurisdiction in the present case. In declining to do so, this Court in no way intends to prejudice any future efforts plaintiffs might make to intervene in the Delaware proceeding.

An order in accordance with the foregoing Memorandum Opinion will be issued of even date herewith.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Judge

Dated: September 11, 1975

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 75-705

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Order.

This case has come before the Court on the motions of various defendants to dismiss and the plaintiffs' opposition thereto. The Court has considered the extensive pleadings filed by the parties in this case, and for the reasons set forth in the memorandum opinion of the Court of even date herewith, concludes that the case should be dismissed because: (a) as to the federal defendant, plaintiffs do not present a case or controversy within the meaning of Article III, section 2 of the United States Constitution; and (2) as to the defendant-manufacturers, plaintiffs do not state a claim upon which relief can be granted.

Therefore, it is, by the Court, this 11th day of September, 1975,

ORDERED, that defendants' motion to dismiss be, and the same hereby is, granted; and it is

FURTHER ORDERED, that this case be, and the same hereby is, dismissed.

/s/ CHARLES R. RICHEY
Charles R. Richey
United States District Court

FIRST OPINION OF THE COURT OF APPEALS.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, and WRIGHT AND ROBINSON, *Circuit Judges*.

Argued September 21, 1976
Decided July 5, 1977

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: We consider here an appeal from a dismissal of an action brought by the appellants under the Freedom of Information Act (FOIA), 5 U. S. C. § 552 (1970 & Supp. V 1975). They seek to obtain, from the Consumer Product Safety Commission, reports which various television manufacturers have submitted on television-related accidents.

For the reasons stated below, we reverse the District Court's dismissal of the plaintiffs' action and remand the case for further proceedings.

I. THE PARTIES

Appellant Consumers Union is a nonprofit consumer organization. It provides information—through its monthly magazine *Consumer Reports* and through other means—on the merits, defects, dangers, and comparative efficacy of consumer goods, including television sets. Appellant Public Citizen, also a nonprofit organization, funds the Health Research Group which conducts research and publishes information for consumers relating to potential hazards to health and safety from consumer products.

Appellee Consumer Product Safety Commission is an independent regulatory agency established by Congress in 1972 pursuant to its enactment of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975). The Commission's purpose is to help implement the Act's policy of establishing "comprehensive and effective regulation over the safety of unreasonably hazardous consumer products." [1] Several of the officers of the Commission and 12 companies that manufacture television sets and do business in the District of Columbia were, together with the Commission, also named as defendants below and are also appellees before this court.

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1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

> (1) to protect the public against unreasonable risks of injury associated with consumer products;
>
> (2) to assist consumers in evaluating the comparative safety of consumer products;
>
> (3) to develop uniform safety standards for consumer products and to minimize conflicting state and local regulations; and
>
> (4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries.

15 U. S. C. § 2051(b) (Supp. V 1975).

II. Background

The background of the present impasse is extensive and, in some respects, complex. In March 1974 the Commission issued a public notice [2] announcing that it would hold a public hearing to investigate hazards encountered during operation of television receivers and to consider the necessity of developing safety standards for such receivers. In the notice the Commission requested certain technical information and data on television-related accidents from manufacturers of television sets and component parts. In particular the Commission requested that the manufacturers submit all accident reports collected since the National Commission on Product Safety held hearings on the subject in 1969.[3] Although a few manufacturers complied with the Commission's request, the principal response consisted of a six-page summary of accident data supplied by the Electronics Industry Association (EIA).

After reviewing the data voluntarily submitted, the Commission concluded that the "information submitted to the Commission by the EIA on behalf of the [companies did] not satisfy the Commission's request."[4] Accordingly, on May 13, 1974 the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1) (Supp. V 1975), sent special orders to 25 manufacturers seeking specified information.[5] In the cover letter accompanying the special orders the Commission noted the possibility of a request for public access to this information via the FOIA, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to substantiate any such claims. Claims of confidentiality accompanied the responses of most manufacturers. Again the Commission reviewed the submitted data and again the Commission found that certain of the manufacturers had not complied with the request. Thus on July 26, 1974 supoenas [sic] *duces tecum* were issued to the appellee manufacturers and three other manufacturers [6] requiring production of specified technical information and all television-related accident data.

Appellants' first request for access, under the FOIA, to data submitted by the manufacturers was in June 1974 and pertained to the documents submitted in response to the Commission's special orders of the previous month.[7] Although appellants were given access to those reports for which confidentiality was not claimed by the manufacturers, they were not allowed access to documents which the manufacturers claimed were exempt from the FOIA.[8] Instead, in August 1974 the Commission informed the manufacturers of appellants' FOIA request and again directed the manufacturers to substantiate their claims of confidentiality. The Commission also extended appellants' FOIA request to the additional data which the Commission later subpoenaed from the manufacturers.[9]

2. 39 Fed. Reg. 10929 (March 22, 1974).

3. *Id.*

4. *E.g.*, Special Order of the Commission to General Electric Company, Docket Item 11A, Ex. A-1, in Civil Action (CA) No. 75-136 (D. Del.).

5. Of the appellee manufacturers here, apparently only RCA did not receive a special order. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, 404 F. Supp. 352, 358 n. 11 (D. Del. 1975).

6. Sony Corporation, Sanyo Electric, Inc., and Wells-Gardner Electronics Corporation were subpoenaed but did not seek to bar public disclosure of data they forwarded to the Commission. Evidently the Commission did not order all manufacturers of television sets sold in this country to submit accident reports. *GTE Sylvania Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 359 n. 18.

7. *Consumers Union of United States v. Consumer Product Safety Com'n*, 400 F. Supp. 848, 850 (D. D. C. 1975).

8. *Id.*

9. *Id.*

Appellants subsequently limited their request to exclude documents protected by the attorney-client privilege or the work product doctrine and those portions of documents that contained names and addresses of accident victims. Even with this limitation, however, appellants' request went unfulfilled.[10] In October 1974, therefore, four months after their initial request, appellants informed the Commission that they would consider any further delay to be a denial. As a result of that communication, representatives of appellants and the Commission met in November 1974 and agreed upon a timetable for completion of the Commission's review of the manufacturers' submissions. It was estimated that the Commission's legal determination as to availability of the requested documents would be completed by mid-March of 1975. Appellants acquiesced in that timetable, but expressly reserved the right to consider additional delay as a denial of their request.[11]

On March 28, 1975—nine months after appellants' initial request—the Commission issued its legal determination that the documents requested by appellants did not fall within the exemptions of the FOIA. It also stated that, even if the data were exempt from mandatory disclosure, disclosure by the Commission was nonetheless within its discretion and, in this case, appropriate in the interest of public health and safety.[12] The Commission subsequently notified the television manufacturers of its decision to release the requested documents on May 1, 1975. After receiving that notice, seven of the manufacturers filed separate actions against the Commission in the United States District Court for the District of Delaware,

10. *Id.*

11. *Id.*

12. *Id.*

each seeking an injunction prohibiting disclosure on the ground that release of the documents is barred by the exemptions to the FOIA and certain portions of the Consumer Product Safety Act, 15 U. S. C. § 2051 *et seq.* (Supp. V 1975).[13] Five other television manufacturers filed similar separate actions in the United States District Court for the Southern District of New York,[14] the United States District Court for the Northern District of New York,[15] and the United States District Court for the Western District of Pennsylvania.[16] In all of the actions the manufacturers applied for temporary restraining orders prohibiting release of the documents pending determination of their motions for preliminary injunctions. The Commission consented to the temporary restraining orders in at least some of the cases.[17] Subsequently the individual actions filed by the television manufacturers were consolidated in the District of Delaware.[18] Even though

13. The following manufacturers filed actions in the District of Delaware: GTE Sylvania (CA No. 75-104), RCA (CA No. 75-108), Magnavox (CA No. 75-112), Zenith (CA No. 75-113), Motorola (CA No. 75-114), Warwick (CA No. 75-115), and Aeronutronic Ford (CA No. 75-116).

14. Matushita (CA No. 75-2040), Sharp (CA No. 75-2049), and Toshiba (CA No. 75-2050) filed actions in the Southern District of New York.

15. General Electric (75-CV-189) filed suit in the Northern District of New York.

16. Admiral (CA No. 75-531) filed suit in the Western District of Pennsylvania.

17. Appellants claimed below that the Commission consented to the orders in all of the cases, while the Commission claimed it consented to some but not all of the orders. For purposes of the motion to dismiss, the District Court below accepted appellants' allegations as true. Memorandum Opinion, *supra* note 7, at 5. Because our disposition on appeal does not turn on the number of orders that the Commission consented to, we do not feel it necessary to resolve the issue here or to remand it to the District Court.

18. *GTE Sylvania Inc. v. Consumer Product Safety Com'n*, *supra* note 5.

Rule 65(b) of the Federal Rules of Civil Procedure has been held to limit the duration of temporary restraining orders to a total of 20 days, absent consent by the party against whom the order was directed, *Sims v. Greene*, 160 F. 2d 512, 516 (3d Cir. 1947), the Commission did not object to requests for further extensions of the temporary restraining orders, with the result that oral argument on the manufacturers' preliminary injunction motions was not heard until July 23, and the stays against the Commission's releasing the information continued until those motions were decided. A preliminary injunction, which the Commission did oppose, was entered on October 23, 1975, prohibiting production of the data.[19] For whatever reason, the appellants did not seek to intervene in this action either to contest the manufacturers in Delaware or to have the action transferred to the District of Columbia. And despite full awareness of appellants' requests for access to the documents, neither the manufacturers nor the Commission even attempted to include appellants as parties or to transfer the cases to the District of Columbia where appellants could readily be joined. Furthermore, though the submissions by the Commission in Delaware plainly put that court on notice of the interest of appellants in release of the documents, the court did not on its own motion inquire about the necessity of joining appellants under Rule 19, FED. R. CIV. P.

After the District Court for the District of Delaware entered the preliminary injunction, the Commission filed an interlocutory appeal. The Commission subsequently filed a voluntary motion for dismissal of the appeal, however, and on May 10, 1976 the motion was granted.[20]

19. *Id.*

20. The Commission's motion is on file with the clerk of the Third Circuit, Docket Nos. 76-1095–76-1107.

On August 20, 1976 the District Court "closed out" the case with no further action planned.

III. THE DECISION BELOW

The instant FOIA litigation was filed in the District Court for the District of Columbia on May 5, 1975 and appellants promptly moved for summary judgment. The Commission and the manufacturers, however, moved to dismiss this action on the ground that no case or controversy existed between appellants and the Commission or, in the alternative, to stay the proceedings pending the decision in Delaware.

Four months later and 15 months after appellants initially asked the Commission for access to the documents, the District Court, without oral argument, filed an opinion and entered an order dismissing the action.[21] The District Court concluded that between appellants and the Commission there was no case or controversy since "on the crucial issue in this case"—the claim that the documents are subject to mandatory disclosure under the FOIA—appellants and the Commission "came to the exact same conclusion": that the documents had to be disclosed.[22] The only reason the Commission was not disclosing the documents, according to the court, was that it was prevented from doing so—first by the several temporary restraining orders and then by the preliminary injunction issued by the District Court for the District of Delaware. The court further concluded that, between

21. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7.

22. *Id.*, 400 F. Supp. at 851. This most definitely is not, however, "a situation in which [the Government] confesses error and represents that the error will be corrected without need for further court action." *Goosby v. Osser*, 409 U. S. 512, 516 n. 4 (1973), and cases cited therein.

appellants and the manufacturers, there was a failure to state a claim upon which relief could be granted.[23]

IV. The Issues on Appeal

We conclude that the District Court erred, and that there is a case or controversy[24] between appellants and the Commission. At its narrowest compass the case or controversy to be resolved concerns the threshold question of the scope and effect of the proceedings in Delaware. The Commission, echoed by the manufacturers, renews on appeal its argument—accepted by the District Court—that, although it would like to provide appellants with the requested documents, the preliminary injunction entered by the Delaware District Court unequivocally precludes it from doing so. Appellants disagree and deny that the preliminary injunction entered in Delaware absolves the Commission of what they believe is the Commission's statutory duty to furnish the requested documents.

This substantial and extensively argued disagreement among the parties to this action fully satisfies the Article III case or controversy requirement.[25] The scope and

23. *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 853.

24. "The term 'controversies,' if distinguishable at all from 'cases,' is so in that it is less comprehensive than the latter, and includes only suits of a civil nature." *In re Pacific Railway Commission,* 32 F. 241, 255 (Circuit Court, N. D. Cal. 1887) (Field, Cir. J.), *quoted in Aetna Life Ins. Co. v. Haworth,* 300 U. S. 227, 239 (1937).

25. In his opinion in *Aetna Life Ins. Co. v. Haworth, supra* note 24, Chief Justice Hughes provided a now classic explanation of the requirement:

> A "controversy" in this sense must be one that is appropriate for judicial determination. A justiciable controversy is thus distinguished from a difference or dispute of a hypothetical or abstract character; from one that is academic or moot.

effect of a prior judgment are always legitimate subjects of argument and resolution in a subsequent action,[26] and the judgment entered by the Delaware District Court suggests no reason why it should be considered an exception.

Moreover, the Commission's conduct of the Delaware litigation provides a second, independent reason for rejecting appellees' contention that a case or controversy is lacking. In fact, reviewing both the administrative and litigational prelude to the instant appeal, the Commission's conduct, in several instances, is not easily reconcilable with its ostensible acceptance of appellants' argument that the requested documents should be disclosed.[27] On

25. (Cont'd.)

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. • • •

300 U. S. at 240-241 (citations omitted).

26. *See* Restatement (Second) of Judgments § 68 (Tent. Draft No. 1, 1973); Advisory Committee Note, 39 F. R. D. 69, 106 (1966), *citing* Restatement of Judgments § 68, comment (h), § 116 (1942); F. James, Civil Procedure § 11.5, at 534-535 (1965); 1B J. Moore, Federal Practice ¶ 0.441[1] at 3772-3773 (Moore & Currier ed. 1974), *quoting Cromwell v. County of Sac,* 94 U. S. (4 Otto) 351, 352-353 (1877). *See also, e.g., Hansberry v. Lee,* 311 U. S. 32, 40-41 (1940); *Gonzales v. Cassidy,* 474 F. 2d 67, 72 (5th Cir. 1973); *Research Corp. v. Edward J. Funk & Sons, Co.,* 15 F. R. Serv. 2d 580 (N. D. Ind. 1971).

We take it to be established beyond cavil that, "[i]nsofar as the • • • judge may have rested his finding of the absence of a case or controversy on the alleged difficulty of formulating a remedy, he also erred." *Goosby v. Osser, supra* note 22, 409 U. S. at 517 n. 5, *citing Louisiana v. United States,* 380 U. S. 145, 154 (1965); *Brown v. Board of Education,* 349 U. S. 294, 300 (1955).

27. For example, despite the time limits imposed on agencies which receive FOIA requests, 5 U. S. C. § 552(6) (1970), the Commission took nine months from the date of appellants' initial request

the basis of this record, we cannot believe that the Commission and the appellants lack the degree of adverseness necessary under the Constitution.

The existence of a case or controversy having been established, we must next consider its merits. That is, we must consider whether the Commission and the manufacturers or, alternatively, the appellants are correct in their assessment of the legal effect on this action of the Delaware judgment. At first glance appellees' position seems strong. The Delaware District Court preliminarily enjoined the Commission from releasing the contested documents, and that injunction has not been modified in any manner. It would thus appear that appellants' request may indeed be foreclosed.

Yet the correctness of this conclusion, toward which the Commission and the manufacturers urge us so enthusiastically, is not nearly as obvious as they would have us believe. The procedural history of the Delaware proceeding—as adduced by the District Court, as well as in the appellate briefs and at oral argument—is troubling and belies the apparent soundness of appellees' position. There is, first, the obvious and important fact that the Delaware District Court never did resolve the merits of the manufacturers' claim that the contested documents should not be released. Rather, the court limited itself to preliminary enjoining the Commsision from releasing the documents in dispute.[28] The opinion accompanying the injunctive order unmistakably confined itself to the propriety of relief *pendente lite*.[29] An order of that type is only "a conservative measure intended • • • to save all rights until the merits of the controversy can be definitely ascertained • • • . It is not an adjudication of rights in any proper sense of the term • • • [and] it does not follow that the

27. (Cont'd.)
for the documents to issue its determination that the documents could legally be released. *See* p. 7 *supra*. Even more "curious" (to borrow the description of the District Court below) is the fact that the Commission, "having just completed a nine-month legal investigation which led to the conclusion that the documents were available under the FOIA, failed to make even a *pro forma* opposition to the motions for restraining order." *Consumers Union of United States v. Consumer Product Safety Com'n, supra* note 7, 400 F. Supp. at 852. Also, as noted above, the Commission did not object to requests for further extensions. *See* p. 8 *supra*.

It is true that the temporary restraining orders were eventually replaced by a preliminary injunction, issuance of which was contested by the Commission. But it is the aftermath of the issuance of this preliminary injunction that constitutes perhaps the most disturbing aspect of the procedural history of this dispute. The Commission initially adopted the quite logical tack of filing an interlocutory appeal from the preliminary injunction. As recounted above, however, soon after filing the appeal *the Commission itself* filed a motion to have the appeal dismissed, and this motion was granted. *See* p. 9 *supra*. Since that time the Commission has evidently made not a single effort to have the District Court take any further action on the case or to have the Third Circuit consider on appeal the District Court's grant of the preliminary injunction. (We particularly stress the Commission's failure to pursue an appeal and its general inaction since the preliminary injunction was granted because these are uncontested facts that, obviously, were not before the District Court when it entered the order from which this appeal is taken.)

In large part, therefore, the prolonged delay and current legal stalemate in this dispute can be attributed to the Commission's inaction. Of course, absent lack of candor or other trifling with the court by the parties, questionable and even clearly incorrect civil litigation strategy is ordinarily beyond the concern of an appellate court. *See, eg., Link v. Wabash R. Co.*, 370 U. S. 626, 633-634 (1962). However, the special nature of the manufacturers' suit in Delaware and its possible effect on Consumers Union and other potential FOIA plaintiffs require this court to pay closer than usual heed to the general background of this dispute and to the overall conduct of the parties.

28. *GTE Sylvania, Inc. v. Consumer Product Safety Com'n, supra* note 5, 404 F. Supp. at 375.

29. The Delaware court found that irreparable harm would attend disclosure of the documents, 404 F. Supp. at 375, and that the manufacturers had presented a "*prima facie* case showing a reasonable probability" that divulgence would be unlawful. *Id.* at 369, *quoting Oburn v. Shapp*, 521 F. 2d 142, 148 (3d Cir. 1975).

final adjudication will be in accordance with the interlocutory order." [30]

Standing alone the preliminary injunction, despite its impact on the agency, could not bar the FOIA action instituted by appellants in the District of Columbia. It would, of course, weigh heavily in any decision as to which of the two suits ought, "giving regard to conservation of judicial resources and comprehensive disposition of litigation," [31] to be stayed or enjoined pending the outcome of the other.[32] Here, however, there is no occasion to engage in the balancing that would ordinarily attend such a situation, for nearly a year after entry of the preliminary injunction the Delaware court entered an order "closing out" the case with no further action planned.

While the "close-out" language employed by the Delaware court finds no parallel in either that court's rules or the Federal Rules of Civil Procedures [sic], it does evince an understanding—apparently shared by the parties before it—that the suit had run its course. No one implies that any intervening determination on the merits has converted the interlocutory relief into a permanent injunction; [33] such

30. *United States Electric Lighting Co. v. Metropolitan Club*, 6 App. D. C. 536, 544 (1895). *Accord, Public Service Com'n v. Wisconsin Telephone Co.*, 289 U. S. 67, 70 (1933); *Industrial Bank of Washington v. Tobriner*, 405 F. 2d 1321, 1324 (D. C. Cir. 1968).

31. *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U. S. 180, 183 (1952). *Cf. Columbia Plaza Corp. v. Security National Bank*, 525 F. 2d 620, 627 (D. C. Cir. 1975). *See also Colorado River Water Conservation Dist. v. United States*, 424 U. S. 800, 817 (1976), and cases cited therein; 2 J. MOORE, FEDERAL PRACTICE ¶ 3.06[2] at 736-739 (Moore & Lucas ed. 1975).

32. *See, e.g., Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co., supra* note 31, 342 U. S. at 183-184; *Columbia Plaza Corp. v. Security National Bank, supra* note 31, 525 F. 2d at 627-628.

33. Neither does anyone contend that the hearing on preliminary relief was *sub silentio* consolidated with a hearing on the merits. See Rule 65(a)(2), FED. R. CIV. P. In view of the strictures placed upon such a practice, that is not surprising. *See, e.g.,*

other possible interpretations of the Delaware court's order as suggest themselves tend toward the conclusion that, although the reverse FOIA action was not dismissed in form, it was dismissed in fact, and by acquiescence of the parties the matter was dropped.

With that, the preliminary injunction is dead.[34] When there is no prospect of an adjudication of the merits, relief that purports to be temporary, pending such an adjudication, is obviously superfluous. Whether this "closing out" acknowledges an informal—or even tacit— "settlement" between the Delaware plaintiffs and the Commission we need not inquire, since if it did such a settlement would be void as against public policy.[35] Thus the preliminary injunction need hardly be considered an insuperable barrier to the suit at bar.

Besides the absence of a disposition on the merits, the Commission's conduct of the Delaware litigation is a second factor that makes us reluctant to accept, without more,

33. (Cont'd.)
Brooks v. Nacrelli, 415 F. 2d 272, 275 (3d Cir. 1969), *on remand*, 331 F. Supp. 1350 (E. D. Pa. 1971), *aff'd*, 473 F. 2d 955 (3d Cir. 1973); *Willits v. Richardson*, 497 F. 2d 240, 244 (5th Cir. 1974); *Pughsley v. 3750 Lake Shore Drive Cooperative Building*, 463 F. 2d 1055, 1057 (7th Cir. 1972); *Dry Creek Lodge, Inc. v. United States*, 515 F. 2d 926, 935 (10th Cir. 1975). *But cf. Fenstermacher v. Philadelphia National Bank*, 493 F. 2d 333, 337 (3d Cir. 1974); *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F. 2d 1096, 1106 (5th Cir. 1972).

34. *See, e.g., Wickes Corp. v. Industrial Financial Corp.*, 493 F. 2d 1173, 1176 (5th Cir. 1974); *Rio Hondo Harvesting Corp. v. Johnson*, 293 F. 2d 426, 427 (5th Cir. 1961); *Heasley v. United States*, 312 F. 2d 641, 648-649 (8th Cir. 1963); *Sweeney v. Hanley*, 126 F. 97, 99 (9th Cir. 1903), *cert. denied*, 193 U. S. 671 (1904). *Cf.* 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2948 at 427 (1973); 7 J. MOORE, FEDERAL PRACTICE ¶ 65.07 at 65-86 (Moore & Lucas ed. 1975). *See also United States v. Professional Air Traffic Controllers Organization*, 449 F. 2d 1299, 1300 (3d Cir. 1971).

35. *Cf. Petkas v. Staats*, 501 F. 2d 887 (D. C. Cir. 1974).

the contention that the Delaware proceedings preclude appellants' suit here. As described above,[36] the Commission was, in several respects, less than vigilant in espousing its putative view that the requested documents should be disclosed.

Yet another, related reason for declining to give the Delaware judgment the preemptive effect that appellees argue it deserves is the absence from the Delaware proceedings of any party requesting disclosure. Not only were the appellants in this case not participants in that suit, neither was any other private party besides the manufacturers. Given the Government's peculiar approach to those proceedings, therefore, the pro-disclosure position was all but unrepresented. This important consideration further attenuates any claim that the preliminary injunction is binding on appellants here.

V. Conclusion

Accordingly, we remand this case to the District Court for the District of Columbia.[37] The issue on remand will be, quite simply, whether or not the documents should in fact be disclosed. In resolving this issue the District Court for the District of Columbia offers a peculiarly appropriate forum. The party that possesses the requested information (*i.e.*, the Commission), the parties that requested the information (Consumers Union and Public

36. *See* pp. 12-13 & note 27 *supra*.

37. Jurisdiction in the District Court is predicated on 5 U. S. C. § 552(a)(4)(B) (Supp. V 1975), which provides that under the FOIA:

> On complaint, the district court of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records improperly withheld from the complainant. • • •

Citizens), and the parties that supplied the information (the manufacturers) are all joined in the suit and are ready to present their respective views on the merits. We find no constitutional or procedural bar to adjudication.

Reversed and remanded.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—

No. 75-2059

—

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

—

Before: BAZELON, *Chief Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

Order.

After considering the applications for rehearing filed by federal appellees, appellees Aeronutronic Ford Corporation, et al., appellees Admiral Corporation, et al., and appellee RCA Corporation, together with supporting memoranda, and appellants' response, it is

ORDERED by the Court that the applications for rehearing are denied for the reasons stated in the attached *per curiam*.

Per Curiam
For the Court
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

PER CURIAM: On June 14, 1974 appellants sought production of the documents in suit here under the Freedom of Information Act. Instead of producing the documents after determining that the Act required production, appellee Consumer Product Safety Commission (CPSC) notified intervenors of their intention to do so. Whereupon intervenors filed injunction proceedings against the CPSC in various district courts, including the District of Delaware, seeking to prevent production. Subsequently, the District Court in Delaware issued a preliminary injunction precluding production. Later that court ordered the case closed with the preliminary injunction still pending.

This appeal is from the dismissal of appellants' FOIA case by the District Court here on the ground that no case or controversy existed since the CPSC agrees with appellants that the documents should be produced but is prevented from doing so by the preliminary injunction in the "closed" Delaware case. We reversed, holding that a case or controversy did indeed exist because CPSC continues to refuse to produce the documents.

Since our ruling we are advised that the Delaware case was marked "closed" for statistical reasons in that the case had been inactive for some time. Also, within a few days after our ruling, the Delaware case suddenly became active with a hearing in court, at which a date for trial on the merits was set. Appellants here, however, who have been attempting since 1974 to obtain production of the documents under FOIA, and against whom the Delaware litigation is directed, are not parties to the Delaware litigation. *See* Rule 19, Fed. R. Civ. P. Since all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA.

5 U. S. C. § 552(a)(4)(B) (Supp. IV, 1974).* Since the Act also provides that actions under it should be expedited, 5 U. S. C. § 552(a)(4)(D) (Supp. IV, 1974), at long last so be it.

So ordered.

* It is noteworthy that the Department of Justice has moved to transfer the Delaware case to the District of Columbia.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before: BAZELON, *Chief Judge*, WRIGHT, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, *Circuit Judges*.

Order.

On consideration of the suggestions for rehearing *en banc*, and no judge in regular active service having requested a vote thereon, it is

ORDERED by the Court, *en banc*, that the aforesaid suggestions are denied.

Per Curiam
For the Court:
George A. Fisher, Clerk

By: ROBERT A. BONNER
Robert A. Bonner
Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 16, 1978

Re: GTE Sylvania, Incorporated, et al. v. Consumers Union of the United States, et al., No. 77-508

The Court today entered the following order in the above-entitled case:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104.

MICHAEL RODAK, JR., Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

MOTION TO SET BRIEFING SCHEDULE.

Appellees GTE Sylvania Incorporated, RCA Corporation, The Magnavox Company, Zenith Radio Corporation, Aeronutronic Ford Corporation, Matsushita Electric Corporation of America, Toshiba-America, Inc., General Electric Corporation, and Admiral Corporation hereby move this Court for an order setting a briefing schedule in the above-captioned action. In support of this motion, appellees state as follows:

1. The complaint in this case was filed on May 5, 1975, by Consumers Union of the United States, Inc., and Public Citizen's Health Research Group seeking an order directing the Consumer Product Safety Commission ("CPSC") to disclose under the Freedom of Information Act approximately 120,000 pages of "TV-related accident data" obtained by the CPSC from a number of television manufacturers. Twelve manufacturers were joined with the CPSC as defendants.

2. On September 5, 1975, Judge Richey granted motions by the defendants to dismiss. The District Court

held that as to the CPSC, the complaint presented no "case or controversy," and as to the manufacturers, the complaint failed to state a claim upon which relief could be granted.

3. On July 5, 1977, this Court entered a Judgment and Opinion reversing the order of dismissal entered by Judge Richey and directing that Judge Richey proceed promptly to determine "quite simply, whether or not the documents should in fact be disclosed." Timely petitions for rehearing with suggestion for rehearing *en banc* were denied on August 25, 1977. On September 9, 1977, this Court granted a stay of its mandate to and including October 3, 1977, pending the filing of petitions for writ of certiorari with the United States Supreme Court.

4. The appellee-manufacturers filed a petition for writ of certiorari with the United States Supreme Court on October 3, 1977. *GTE Sylvania Inc., et al. v. Consumers Union of the United States, Inc., et al.*, No. 77-508. After receiving a 20-day extension of time, appellants Consumers Union and Health Research Group filed an opposition on November 23, 1977.

5. On December 8, 1977, the United States District Court for the District of Delaware (Latchum, C. J.) entered a Judgment and Opinion in *GTE Sylvania Inc., et al. v. Consumer Product Safety Commission, et al.*, C. A. Nos. 75-104, *et al.*, permanently enjoining the CPSC from releasing to the public the same "TV-related accident data" at issue in this proceeding. Copies of that Judgment and Opinion are attached as Exhibits 1 and 2, respectively, to the Motion to Lodge Exhibits accompanying the instant motion.

6. On January 16, 1978, the United States Supreme Court entered the following order in *GTE Sylvania Inc., et al. v. Consumers Union of the United States, Inc., et al.*, No. 77-508:

> The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the District of Columbia Circuit for further consideration in light of the permanent injunction entered by the United States District Court for the District of Delaware on December 8, 1977 in Civil Action No. 75-104.

7. It is respectfully submitted that further briefing by the parties is warranted as an aid to this Court in complying with the Supreme Court's directive to further consider this case in light of the Delaware court's permanent injunction. Appellees suggest that the following schedule be adopted:

(a) Appellees to file briefs within 45 days after entry of the order setting briefing schedule;

(b) Appellants to file answering briefs within 30 days; and

(c) Appellees to file reply briefs within 14 days.

Respectfully submitted,

[Signatures of Counsel Deleted]

Dated: January 30, 1978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF THE UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

APPELLANTS' MOTION TO SET BRIEFING SCHEDULE ON REMAND.

On July 14, 1977, this Court issued its opinion reversing the decision of the district court and remanding the case for consideration on the merits. 561 F. 2d 349. Appellees filed various petitions for rehearing, with suggestions for rehearing *en banc,* which were denied in orders issued August 25, 1977. 565 F. 2d 721. Thereafter, the non-federal appellees (ten manufacturers of television sets) filed a petition for a writ of certiorari in the Supreme Court which was opposed by both appellants and the federal appellees. While that petition was pending, the United States District Court for the District of Delaware entered a permanent injunction in a related case in favor of the manufacturers against the federal parties. This fact was called to the attention of the Supreme Court in a supplemental brief by the manufacturers and urged as a further basis for granting full review, or in the alternative, for summarily vacating the judgment of this Court and directing this Court to affirm the district court's dismissal in light of the permanent injunction in Delaware. Those suggestions were specifically opposed by appellants in a supplemental memorandum filed in the Supreme Court. The Supreme Court entered its order on January 16, 1978, in which it granted the writ, and summarily vacated the decision of this Court and remanded to this Court for further consideration in light of the permanent injunction in Delaware.

Although appellants contend that the permanent injunction has no effect on their right to pursue this Freedom of Information Act action, since they were not parties to the Delaware action and no attempt was ever made to join them there and that therefore it would be appropriate for this Court to enter an order simply reaffirming its prior decisions, it may be that the Court would desire further briefing on the question. If that is the case, appellants believe that it would be proper for those parties who contend that the issuance of the permanent injunction is a reason for a modification of this Court's prior rulings to submit their briefs within fourteen days, with replies due ten days thereafter. This schedule is more than adequate since the issue has largely been briefed in the Supreme Court already, and, as this Court recognized in its orders on rehearing, this case is entitled by statute to expeditious treatment. 5 U. S. C. § 552(a)(4)(D).

Respectfully submitted,

[Signatures of Counsel Deleted]

Dated: Washington, D.C.
February 24, 1978

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-2059

CONSUMERS UNION OF UNITED STATES, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Before WRIGHT, *Chief Judge*, and BAZELON and ROBINSON, *Circuit Judges*.

Order.

Filed September 20, 1978

Upon consideration of the respective motions of appellants and appellees to set a briefing schedule, it is

ORDERED by the Court that the parties file, within 20 days from date of this order, memoranda in typewritten form setting forth their views as to the course this Court should take in light of the remand of the case by the Supreme Court to this Court for further consideration. The parties are instructed to address with particularity the question whether the permanent injunction entered in *GTE Sylvania v. Consumer Product Safety Commission*, Civ. No. 75-104 (D. Del. Dec. 8, 1977), bars appellants, who were not parties in that case, from litigating in this case their claim that the materials at issue should be disclosed.

Per Curiam

For THE COURT

GEORGE A. FISHER
Clerk

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.*

October 23, 1975

Opinion.

LATCHUM, *Chief Judge*.

In these thirteen separate actions, each plaintiff, a manufacturer of television receivers, seeks a preliminary injunction restraining the Consumer Product Safety Commission ("Commission"), its members and officers from disseminating certain information to the public which the plaintiffs contend is privileged, confidential, misleading and inaccurate.

Congress, in 1972, enacted the Consumer Product Safety Act (the "Act"), 15 U. S. C. § 2051 et seq., in order to "establish comprehensive and effective regulation over the safety of unreasonably hazardous consumer products."[1]

* Consolidated with, RCA Corp., 75-108; Magnavox Co., 75-112; Zenith Radio Corp., 75-113; Motorola, Inc., 75-114; Warwick Electronics, Inc., 75-115; Aeronutronic Ford Corp., 75-116; Teledyne Mid-America Corp., 75-122; Admiral Corp., 75-131; General Electric Co., 75-136; Matsushita Electric Corp. of America, 75-150; Sharp Electronics Corp., 75-151; and *Toshiba America, Inc. v. Consumer Product Safety Commission*, 75-152.

1. H. R. Rep. No. 1153, 92d Cong., 2d Sess. 26 (1972). The purposes of the Act are:

"(1) to protect the public against unreasonable risks of injury associated with consumer products;

To implement and administer this legislative policy, the Act established the Commission as an independent regulatory agency. Shortly after its creation, the Commission became concerned about the safety of television sets. During the spring and summer of 1974, the Commission sought and obtained television-related accident data from television manufacturers in three ways: by a general public request for information, by a special order pursuant to 15 U. S. C. § 2076(b)(1), and finally by the issuance of subpoenas duces tecum pursuant to 15 U. S. C. § 2076 (b)(3). Upon receipt of such information, the data was consolidated and a computer printout was prepared which listed the alleged accident separately. On March 28, 1975, the Commission decided to release to the public the bulk of the television-related accident material in its possession which it had gathered from the plaintiffs.

Subsequently, each of the thirteen plaintiffs brought a suit against the Commission [2] for an injunction prohibiting the public dissemination of the information obtained from each on the ground that such information was privileged, confidential, misleading and inaccurate. The thirteen

1. (Cont'd.)

(2) to assist consumers in evaluating the comparative safety of consumer products;

(3) to develop uniform safety standards for consumer products and to minimize conflicting State and local regulations; and

(4) to promote research and investigation into the causes and prevention of product-related deaths, illnesses, and injuries." 15 U. S. C. § 2051(b).

2. In addition to the Commission, the following members, officers and employees were named as defendants: Richard O. Simpson, Chairman, Constance B. Newman, Vice Chairman, R. David Pittle, Lawrence M. Kushner, Barbara Hackman Franklin, Commissioners, Sadye E. Dunn, Secretary, and Vince DeLuise, Freedom of Information Officer. They will be referred to collectively as the "Commission" or "defendants."

actions were consolidated [3] for a hearing on plaintiffs' motions for preliminary injunctive relief. The defendants also consented to the entry of a temporary restraining order [4] prohibiting the public disclosure pending the Court's decision on plaintiffs' present motions.[5]

I. Background

In March 1974, the Commission issued a public notice [6] announcing that it would hold a public hearing to investigate the hazards encountered during the operation of television receivers and to consider the necessity of developing safety standards for such receivers. By this notice, the Commission sought certain technical information and TV-related accident data from manufacturers of television sets and the component parts thereof. The notice described the accident data sought in part as follows:

> "Although the hearing is intended to emphasize fires and shocks related to TV sets, information pertaining to all aspects of TV set safety may be submitted (with the exception of radiation hazards . . .).
>
> • • •

3. Docket Item 10 (C. A. No. 75-104).

4. Docket Item 3 (C. A. No. 75-104). The temporary restraining order was later modified to permit release of the gathered information to four employees of Underwriters Laboratories, Inc., which had been retained by the Commission to develop safety standards for television receivers. In addition the data without identification of manufacturer, model or chassis number was authorized to be released to Underwriters Laboratories, Inc. and other individuals involved in developing the safety standards. Docket Item 34 (C. A. No. 75-104).

5. Defendants also moved for summary judgment in each case (Docket Item 35, C. A. No. 75-104), but these motions are not presently before the Court. (Docket Item 42, p. 3, C. A. No. 75-104).

6. 39 Fed. Reg. 10929 (March 22, 1974).

> . . . In particular, each TV manufacturer is requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in the 1969 'Electronic Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, place (sic) indicate the procedures used." [7]

Although a few manufacturers complied with the Commission's general request for data, their principal response consisted of a six page summary of accident data supplied by the Electronics Industry Association ("EIA").[8]

After reviewing the data voluntarily submitted, the Commission concluded that "the information submitted to the Commission by the EIA on behalf of the [Companies did] not satisfy the Commission's request." [9] Thus on May 13, 1974, the Commission, acting pursuant to 15 U. S. C. § 2076(b)(1),[10] sent special orders to twenty-five manufacturers of television receivers and components.[11] The information sought by these special orders

7. *Id.* 10930.

8. Par. 5 Affidavit of Constance B. Newman, Vice Chairman of the Commission ("Newman Aff'd") Docket Item 27, C. A. No. 75-112.

9. *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C. A. No. 75-136.

10. 15 U. S. C. § 2076(b)(1) provides: "The Commission shall have the power—(1) to require, by special or general orders, any person to submit in writing such reports and answers to questions as the Commission may prescribe; and such submission shall be made within such reasonable period and under oath or otherwise as the Commission may determine."

11. Of the plaintiffs here, only RCA did not receive a special order. Newman Aff'd, par. 6.

was broken down into six categories: (1) TV-related accident data, (2) Current, future-planned and suggested TV-related safety standards, (3) Quality control and quality assurance plans, (4) Service technicians, (5) Improvement plans for presently used sets, and (6) Specific technical areas.[12]

The instructions for the TV-related accident data category provided:

> "You are requested to submit all accident reports collected since the 1969 hearings held by the National Commission on Product Safety. If present data recording procedures differ from the method proposed in 1969 'Electronics Industry Ad Hoc Engineering Report on Television Fires' which was submitted to the National Commission on Product Safety, please indicate the procedures used." [13]

In the cover letter [14] accompanying the special orders, the Commission "[recognized] that some of the information to be submitted [might] be proprietary" and referred the manufacturer to certain statutory provisions [15] designed to protect confidential information supplied to the government. The Commission encouraged compliance by stating in the cover letter:

> "This information will be received in confidence. It will not be placed in a public file and will not initially be made available to the public."

12. *E.g.*, Special Order of Commission to General Electric Company. Docket Item 11A, Ex. A-1, C. A. No. 75-136.

13. *Id.*

14. *E.g.*, Letter of Richard O. Simpson, Chairman of the Commission, to General Electric Company, May 13, 1974. (Docket Item 11A, Ex. A-1, C. A. No. 75-136).

15. 15 U. S. C. § 2055(a)(1), 5 U. S. C. § 552(b)(4) & (7), 15 U. S. C. § 2055(a)(2), and 18 U. S. C. § 1905.

However, the possibility of a request for public access to this information by way of the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552, was noted, and the manufacturers were instructed to identify data claimed to be exempt from public disclosure and to "substantiate" any such claims. Claims of confidentiality accompanied the response of most manufacturers.[16]

Again, the Commission was not satisfied with the data supplied by the manufacturers pursuant to the special orders and the companies were notified as follows:

> "The Commission has reviewed your response to its May 13, 1974, Special Order requesting information on TV-related fire and shock hazards. Although we recognize your effort to comply with the terms of the Special Order, technical analysis shows that your response fails to provide sufficient information with respect to certain questions enumerated in the Order.
>
> Accordingly, the Commission has decided to issue the attached subpoena, pursuant to section 27(b)(3) of the Consumer Product Safety Act [15 U. S. C. § 2076(b)(3)] which specifies the additional information required.
>
> It should be noted that failure to respond to the subpoena within the time specified therein may, pursuant to section 27(c) of the Act [15 U. S. C. § 2076(c)] lead to entry of a court order against you directing compliance with the Commission's subpoena." [17]

16. *E.g.*, Letter of H. C. Burgess, General Electric Co., to Richard O. Simpson, Chairman of the Commission, May 29, 1974. Docket Item 11A, Ex. A-2, C. A. No. 75-136.

17. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission, to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C. A. No. 75-136).

Thus, on July 26, 1974 subpoenas duces tecum were issued to the plaintiffs and three other TV manufacturers [18] requiring the production of certain technical information and all television-related accident data [19] as follows:

> "All TV-related accident reports collected since the 1969 hearings held by the National Commission on Product Safety. The term 'reports', includes, but is not limited to, all physical forms of: correspondence, letters; telegrams; cables; tapes; recordings; photographs; films; memoranda, including writeups of telephone calls and other oral communications; press releases, bulletins; newspaper, magazine or other journalistic articles; diaries; charts; contracts; agreements; and any other writing prepared by any person or persons, including those by insurance firms, investigators, laboratories and researchers; and includes both origi-

18. Sony Corp., Sanyo Electric, Inc., and Wells-Gardner Electronics Corp. were subpoenaed but did not seek to bar public disclosure of data which they forwarded to the Commission. Newman Aff'd, par. 8. Apparently, the Commission did not order all manufacturers of TV sets sold in this country to submit accident reports. Deposition of Robert L. Northedge ("Northedge Dep.") p. 78. Northedge, an electrical engineer, employed by the Bureau of Engineering Science of the Commission was project manager of the Commission's investigation of television hazards.

19. *E.g.*, subpoena duces tecum addressed to H. B. Walden, General Electric Co., July 26, 1974 (Docket Item 11A, Ex. A-3, C. A. No. 75-136). Prior to serving the subpoenas the Commission had been warned of the confusion that might result from the problem of defining a TV-related accident. Letter of A. E. Allen, Philco-Ford Corp. to the Commission, May 28, 1974 appended to Joint Memorandum of GTE Sylvania and Aeronutronic Ford Corp. in support of motion for preliminary injunction (Docket Item 24, C. A. No. 75-104). Evidently, there is no standard definition of TV-related accidents. Northedge Dep. pp. 29-32. Moreover, the brief preface of the subpoenas referred to the Commission's "investigation of shock and fire hazards associated with television receivers," but the body of the subpoenas designated "[a]ll TV-related accident reports."

nals and copies whether or not sent or received. The term 'reports' includes those reports maintained on a form (sample attached) designed by members of the Electronics Industries Association (EIA) and submitted to the National Commission on Product Safety in November 1969 and also those reports maintained on any and all forms substituted for the attached sample EIA form." [20]

Standards of reliability and accuracy for the data sought were indicated on sample data forms accompany-the subpoenas.

"The purported information in this form is based upon such reports as are available but in many cases will be incomplete, unverified and even incorrect." [21]

The Commission sought unverified information intentionally because it wanted to obtain as large a data base as possible.[22] Again, accident reports supplied in compliance with the subpoena duces tecum were accompanied by claims of confidentiality.[23] However, the Commission did not mention the issue of confidentiality in either the subpoena or the cover letter.

In order to reduce the information contained on the approximately 120,000 pieces of paper received in response to the subpoenas duces tecum to a manageable form, the

20. The description of TV-related accident data was identical for each subpoena. On the other hand, the technical information requested did vary slightly from manufacturer to manufacturer, but, generally, it corresponded to the materials sought in the May 13, 1974 special order. (Newman Aff'd, par. 9.)

21. Docket Item 35, C. A. No. 75-104.

22. Northedge Dep. pp. 169, 200, 258.

23. Newman Aff'd, par. 10; *E.g.*, Letter of F. R. Wellner, General Electric Co., to Sayde E. Dunn, Secretary of the Commission, October 22, 1974 (Docket Item 11A, Ex. A-4, C. A. No. 74-136).

Commission retained Tracor-Jitco, Inc. ("Tracor") to extract and categorize the data contained in the accident reports.[24] This consolidation of information was designed to assist the organization engaged in developing safety standards and also to make the accident data more meaningful to members of the public who might inspect it under the Freedom of Information Act.[25] Data summary sheets were prepared by gleaning from accident reports the appropriate responses for the several categories.[26] Although many reports did not contain enough data to answer each question,[27] the Commission was seeking as much information in manageable form as possible.

Tracor was responsble for transferring information from the accident reports to the data summary sheets from which the computer cards could be keypunched. In order to ensure that Tracor's employees performed the tasks accurately, Tracor's supervisor initially reviewed every sheet and later performed random checks by comparing the extracted data against the original report. Also, Robert A.

24. Newman Aff'd, pars. 10, 15.

25. Northedge Dep. pp. 24-25; Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

26. A memorandum from Edward J. Cull, Office of General Counsel, to the Commissioners ("Cull-Memorandum") 2, March 21, 1975 (Docket Item 11A, Ex. A-7, C. A. No. 75-136) lists twenty-five categories of extracted information: (1) file number assigned to the accident, (2) manufacturer, (3) model numbers, (4) chassis number, (5) TV type (color or black and white), (6) chassis type, (7) switch type, (8) model type, (9) cabinet material, (10) year of manufacture, (11) owner's initials, (12) failed part, (13) location of failed part in set, (14) prior indication of trouble, (15) repaired prior to accident, (16) electric power status, (17) time in electric power status, (18) type of accident, (19) time of day, (20) state, (21) location, (22) number of injuries, (23) number of fatalities, (24) damage and (25) amount and type of claims. The Newman affidavit indicates that there were twenty-seven categories of information. Newman Aff'd, par. 15(a).

27. Northedge Dep. pp. 190-94.

Yereance, a consultant retained by the Commission, screened the same sheets that the Tracor supervisor examined. Finally, Robert L. Northedge, the Commission project manager, reviewed some of the abstracts.[28]

Then, the information on the data summary sheets was keypunched by another organization under contract with the Commission and was read into a Commission computer program which produced a printout of the information previously coded.[29] The printout was reviewed but only about fifty individual accident reports were checked against their summaries on the computer printout.[30]

At this point, there were 10,765 separate line items;[31] each line item represented a separate report. Tracor next undertook a duplication search. The duplication search was carried out by selecting a particular category of information and grouping the reports according to a common parameter within that category. For example, the accidents reported were grouped by the states in which they occurred; they were also grouped alphabetically by the initials of the victim; listing model numbers consecutively constituted another method. After grouping, summaries exhibiting the same classifying parameters were inspected for other similarities. When the comparison indicated that the reports might be related, the original accident reports were examined.[32] As a result of this endeavor, separate reports of the same incident were consolidated and exact duplicates were eliminated. This winnowing procedure reduced the number of accident reports to 7,620.[33]

28. *Id.* pp. 216-20. It was not considered necessary to review every data sheet. *Id.* p. 219.

29. At least 99 percent of the accident reports summarized on the computer printout were obtained through the subpoenas duces tecum. *Id.* p. 247.

30. *Id.* p. 112.

31. *Id.* p. 221.

32. *Id.* pp. 223-225.

Tracor also classified as confidential the identity of the victim and any documents encompassed by the work product doctrine and the attorney-client privilege.[34] This information, therefore, has been excluded from the filed accident reports and computer printout.[35]

A Commission consultant, Robert A. Yereance, prepared a report captioned "Analysis of TV Accident Data"[36] ("Yereance Report"), the purpose of which was stated to be as follows:

> "To assist in the processing of the TV-related accident data and to analyze and summarize the data following completion of the data processing, the Commission hired a consultant, Robert A. Yereance. Mr. Yereance has prepared for the benefit of the offeror which has been selected to develop a TV standard, a report entitled, 'Analysis of TV Accident Data.' This report, which is based upon the accident data submitted to the Commission by the manufacturers, analyzes that data in terms of the number of television sets in use in the United States and the relative incidence of television-related accidents. The report does not identify a particular manufacturer, TV model, or chassis; it contains only industry-wide statistics. The

33. Newman Aff'd, par. 17.

34. *Id.* par. 15(c).

35. *Id.* par. 17.

36. Docket Item 41, C. A. No. 75-104. The temporary restraining order initially covered the Yereance Report. See note 4, *supra.* However, subsequent modification of that order (Docket Item 34, C. A. No. 75-104) provided that the Yereance Report, absent objection from plaintiffs, could be forwarded to Underwriters Laboratories, Inc. and those individuals assisting that organization in the development of safety standards.

purposes of this report were to answer basic questions concerning TV-related hazards to provide a picture of the magnitude or relative significance of hazards that exist in TV sets currently in use, and to point out information which should prove valuable in the development of a standard to reduce hazards." [37]

The requirement that manufacturers submit reports of dubious validity apparently reflected the Commission's concern that limiting the subpoenas to only verified reports would result in a data base which would be too small for proper analysis.[38] Also, it was thought that trends indicating design inadequacies of a particular manufacturer might appear.[39] However, the Commission never attempted to distinguish the verified reports from the unverified reports.[40] Indeed of the more than 7,600 tabulated reports, the Commission investigated less than 100 of them.[41]

Furthermore, the confusion generated by the lack of a clear definition of "TV-related accident" [42] is aptly reflected in the following dialogue between counsel for RCA and the Commission's project manager, Robert L. Northedge:

"Q. [By Mr. Tiger] Mere speculation is enough to characterize it as a TV-related accident?

A. [By Mr. Northedge] For the purposes for which we subpoenaed this information, yes.

Q. Is it proper to characterize as a TV-related accident the situation where someone is watching tele-

37. Newman Aff'd, par. 18.
38. *Id.* par. 9; Northedge Dep. pp. 169, 200, 258.
39. Northedge Dep. pp. 242-43.
40. *Id.* p. 262.
41. *Id.* p. 43.
42. See note 19 *supra*.

vision while smoking a cigarette and the lit cigarette falls in the cushioning of a chair and starts a fire?

(Whereupon, the reporter read the pending question.)

THE WITNESS: I wouldn't think that would be proper.

Q. [By Mr. Tiger] What if, during the fire, the TV caught on fire?

A. [By Mr. Northedge] It would be classified as a TV-related accident.

Q. Is it proper to characterize as a TV-related accident the situation where a fire results from defective wiring in the house and the point of origin of the fire happens to be in the area of the television set?

A. Yes, because it is possible that the TV could have—we don't know, but it is possible that the TV could have caused the short circuit in the wall outlet.

Q. What if the TV didn't cause the short circuit in the wall outlet, it was caused by something else?

A. Well, in many cases we don't know this so it is entered as a TV-related fire.

Q. Is it proper to characterize as a TV-related accident, the situation where a burning candle sitting on top of a television set melts the cabinet?

A. Yes." [43]

Thus, it appears that an accident which would have been "TV-related" in one view could feasibly be perceived by another as not being "TV-related." That the Commission was well aware of the confusion and its consequences is

43. Northedge Dep. pp. 120-21. The following would also be classified as "TV-related accidents": cutting a finger on a screw protruding from a TV cabinet, *id.* p. 35; sustaining a hernia while carrying a TV set, *id.* pp. 35, 116; fire caused by a candle that had been placed on top of a TV cabinet, *id.* pp. 172-73.

clearly reflected in an internal memorandum which reads in part:

> "It should be noted that some manufacturers appear to have submitted accident reports pertaining to fire and shock incidents only. Whereas, other manufacturers have submitted incident reports on TV tube implosions, carrying handle failures; (sic) instability of TV stands, etc., as well as incident reports on fire and shock." [44]

Moreover, although some manufacturers did not comply fully with the subpoena, the Commission never made any effort to compel the appropriate response [45] because it had made "a technical judgment that sufficient information [had] been collectively submitted by the sixteen manufacturers to significantly facilitate the Commission's regulatory development activities for TV receivers." [46]

Finally, the Commission's disclaimer accompanying the release to the public of the data submitted by manufacturers who are not parties to these actions focused on another critical source of inaccuracy:

> "The television accident statistics being released to you may be misleading because some television manufacturers were more conscientious then (sic) others in maintaining television accident files." [47]

44. Bureau of Engineering Sciences of the Commission, "Report on Subpoena Compliance," Dec. 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

45. Northedge Dep. pp. 259-61.

46. Memorandum of Robert L. Northedge to Enid Rubenstein of the Commission, December 3, 1974 (Docket Item 11A, Ex. B, C. A. No. 75-136).

47. Newman Aff'd, par. 28. "It is recognized that some television manufacturers have apparently been more conscientious in compiling accident data than others and thus, the release of the accident data might be misleading in some cases, i.e., a higher

Notwithstanding this melange of inaccuracies, the Commission reached a final decision on March 28, 1975 [48] to release to the public the TV-related accident data and the computer printout compiled from the information obtained from the plaintiffs.[49] In deciding to release this information to the public, the Commission relied [50] upon a memorandum [51] prepared by its Office of General Counsel. The reasons for the disclosure are not clearly and explicitly set forth in this memorandum. However, it does state,

47. (Cont'd.)
accident rate for one particular TV model than similar models because more complete records were maintained." Cull Memorandum, p. 7.

48. Newman Aff'd, par. 19. The Commission on August 21, 1974 apparently had promised the plaintiffs that the Secretary would first make an initial determination of the disclosure issues and that the Secretary's decision could be appealed to the Commission. *E.g.*, Letter of Sadye E. Dunn, Secretary of the Commission to H. B. Walden, General Electric Co., August 2, 1974 (Docket Item 11A, Ex. A-5, C. A. No. 75-136). Despite this promise, the decision on disclosure was made by the Commission initially and the possibility of an appeal was foreclosed. See Cull Memorandum, p. 4. Thus, no hearing was held on the claims asserted by the plaintiffs. Furthermore, the letter notifying the plaintiffs of the Commission's decision to release the accident data provided only for a minimum of ten days before disclosure. *E.g.*, Letter of Vince DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania Inc., April 8, 1975 (Docket Item 35, C. A. No. 75-104). Telegrams from the Commission eventually fixed May 1, 1975 as the proposed date of disclosure (Docket Item 11A, Exs. A-8, A-9, C. A. No. 75-136).

49. These materials will be referred to as "information" or "accident data." The Commission evidently does not intend to release the technical information that it obtained from the plaintiffs. Newman Aff'd, par. 20; Docket Item 42, p. 53, C. A. No. 75-104. After the decision to disclose was reached by the Commission, the Yereance Report was prepared.

50. Newman Aff'd, par. 19.

51. Cull Memorandum. A copy of this memorandum is included in what the Commission terms its administrative record in each case. *E.g.*, Docket Item 35, C. A. No. 75-104.

"The release of the acident data would assist consumers to better evaluate the safety of TVs." [52] No other affirmative reason in support of disclosure was offered.[53]

In her affidavit of June 27, 1975 submitted during the course of this litigation, the Commission's Vice Chairman also asserted that "disclosure of the information would serve the important purpose of informing the public that hazards may exist in operating television receivers," and "would provide consumers with an indication of the kinds of questions that they should consider when purchasing a television set" and "that the large data base of TV-related accidents that [the Commission] had compiled would be useful to other parties interested in investigating the potential hazards associated with television receivers." [54]

On the other hand, the numerous sources of inaccuracy compelled the Commission's consultant, Robert A. Yereance, to disagree with the Commission's decision to disclose the data. According to Northedge, "he didn't feel that much of it should be released at all." [55] Furthermore, even Northedge concluded that the public could not meaningfully utilize the data as a valid basis for comparing the

52. *Id.* p. 5. Also the Commission's letter informing the plaintiffs of its disclosure decision mentioned "public health and safety" as a reason for disclosure. *E.g.*, Letter of DeLuise, Freedom of Information Director of the Commission to Merle W. Kremer, GTE Sylvania, Inc., April 8, 1975 (Docket Item 35, C. A. No. 75-104).

53. The bulk of the memorandum purports to establish that the Commission can release the data to the public under the Freedom of Information Act, 5 U. S. C. § 552. The impact of the Freedom of Information Act on the present actions will be discussed later in this opinion. See notes 73-76 and accompanying text, *infra*.

54. Newman Aff'd, par. 29. The propriety of considering these justifications raised initially in these proceedings is considered later. See notes 64 and 71 and accompanying text *infra*.

55. Northedge Dep. p. 146.

safety of the various manufacturers' televisions.[56] In sum, it is apparent that the information obtained from the plaintiffs which the Commission proposes to release would be misleading to the consumer who attempted to use it for evaluating the relative safety of TV receivers manufactured by the plaintiffs.

II. Plaintiffs' Contentions.

The manufacturers have made numerous arguments in support of their contentions that disclosure of this information would be improper and that issuance of a preliminary injunction prohibiting disclosure would be appropriate.[57]

56. *Id.* pp. 179, 256. This point was conceded by the defendants at oral argument (Docket Item 42, p. 74, C. A. No. 75-104). Northedge's final comments at his oral deposition clearly show that he, as project manager, could discern no benefit to the public of such disclosures. For example (Northedge Dep. pp. 276-277):

> "Q. [By Mr. Palmer] Well, you have previously testified that the data is not meaningful as a basis for consumers to make comparative safety assessments among the different manufacturers. What purpose is served by the release of the identity of particular manufacturers other than to facilitate such a concededly invalid comparison?
>
> A. [By Mr. Northedge] I don't know what purpose there would be.
>
> Q. In other words, you can't think of any purpose that would be served by that?
>
> A. Offhand, I cannot think of any purpose."

The Commission has offered plaintiffs the opportunity to come forward with information that would "substantiate" their claims of inaccuracy or duplication. Aff'd of Sheldon D. Butts, Assistant Secretary of the Commission, par. 2 (Docket Item 35, C. A. No. 75-104); Newman Aff'd, par. 27.

57. Although the manufacturers individually have raised different issues and stressed different arguments, their contentions are considered collectively. Also, while raising the same general issue individual plaintiffs may have emphasized uniquely perceived nuances. Therefore, even though the principal arguments are indicated, the list should not be viewed as an all inclusive catalogue.

First, the plaintiffs assert that release of the information is prohibited by 15 U. S. C. § 2055(a)(2) which provides that information obtained by the Commission which "relates to a trade secret or other matter referred to in section 1905 of Title 18 shall be considered confidential and shall not be disclosed." The accident reports are viewed as being within a protected category.

Second, the Freedom of Information Act, 5 U. S. C. § 552, and 15 U. S. C. § 2055(a)(1) which refers to the FOIA are perceived as conferring upon the plaintiffs an affirmative right to block public release of the information.

Third, the Commission is charged with having violated 15 U. S. C. § 2055(b)(1) which in part requires the Commission to "take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes of [the Act]."

Fourth, the manufacturers challenge the procedure followed by the Commission in deciding to release the data. The Commission is said to have failed to promulgate rules to accommodate its information dissemination functions as required by FOIA, 5 U. S. C. § 552(a)(1), and to have failed to provide notice thirty days prior to public disclosure of the information and to supply a summary of the information destined for disclosure as mandated by 15 U. S. C. § 2055(b)(1), and to have failed to comply with an earlier promise of an administrative appeal.

Fifth, the plaintiffs maintain that the Commission is estopped from disclosing the information because of the Commission's representation to the manufacturers that the material obtained would not be made public.

Finally, an accusation of having violated the Due Process Clause of the Fifth Amendment is brought against the Commission. This constitutional argument is founded upon both alleged procedural deficiencies and the arbitrary nature of the Commission's decision to make public the previously confidential information.

III. Jurisdiction and Scope of Review.

Although the plaintiffs have pleaded several jurisdictional grounds,[58] the Court finds that it has jurisdiction of this matter by virtue of 28 U. S. C. § 1337, which provides:

> "The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . . ."

First, the general purpose of the Act to protect individuals who use consumer goods suggests a Congressional intention to regulate commerce.[59] Second, and more importantly, the regulation of commerce aspect of this legislation was explicitly set forth in 15 U. S. C. § 2051(a)(6).

> "The Congress finds that—
>
> * * *
>
> regulation of consumer products the distribution or use of which affects interstate or foreign commerce is necessary to carry out this chapter."

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58. Among the asserted bases for jurisdiction are 28 U. S. C. §§ 1331, 1332, 1346, 1361, 2201-02 and 5 U. S. C. §§ 702, 704. While some plaintiffs failed to mention the source of jurisdiction upon which the Court relies, it is nevertheless appropriate for the Court to recognize the applicability of § 1337 to those plaintiffs' claims. *Cf. Sun Printing & Publishing Ass'n v. Edwards*, 194 U. S. 377, 24 S. Ct. 696, 48 L. Ed. 1027 (1904).

59. *See, e.g.*, S. Rep. No. 835, 92d Cong., 2d Sess. 7 (1972); H. R. Rep. No. 1153, 92d Cong., 2d Sess. 21-24, 26-27 (1972), U. S. Code Cong. & Admin. News 1972, p. 4573.

Thus, it is clear that the Act can be included under the umbrella of § 1337.[60] Furthermore, § 1337 constitutes an appropriate basis for the review of an administrative determination. *Davis v. Romney,* 490 F. 2d 1360 (C. A. 3, 1974); *General Motors Corp. v. Volpe,* 457 F. 2d 922 (C. A. 3, 1972), *aff'g* 321 F. Supp. 1112 (D. Del. 1970).

Closely akin to the issue of jurisdiction is the question of plaintiffs' standing to seek the requested relief.[61] First, adverse publicity and harm to commercial reputation which would likely result from the proposed disclosure would amount to "injury in fact." Second, the requirements of 15 U. S. C. § 2055(b)(1) that the Commission take reasonable steps to assure accuracy and that disclosure be fair in the circumstances reflect a concern for the impact that inaccuracies and misleading public releases might have on manufacturers whose products were being investigated by the Commission. Thus, the interests which the plaintiffs seek to preserve are "arguably within the zone of interests to be protected" by 15 U. S. C. § 2055(b)(1). *Data Processing Service v. Camp,* 397 U. S. 150, 151-154, 90 S. Ct. 827, 25 L. Ed. 2d 184 (1970); *Merriam v. Kunzig,* 476 F. 2d 1233 (C. A. 3, 1973), *cert. den. sub nom. Gateway Center Corp. v. Merriam,* 414 U. S. 911, 94 S. Ct. 233, 38 L. Ed. 2d 149.

Judicial review of administrative actions, of course, is governed by the Administrative Procedure Act, specifically

60. It should also be noted that when the Act was codified in the United States Code, it was placed in Title 15, which deals with trade and commerce.

61. See also 5 U. S. C. § 702 (Administrative Procedure Act) which provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U. S. C. §§ 701-706.[62] It is clear "that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Abbott Laboratories v. Gardner,* 387 U. S. 136, 140, 87 S. Ct. 1507, 1511, 18 L. Ed. 2d 681 (1967). No statute prohibits review of Commission action, and nothing has been found to suggest that Congress intended to confer upon the Commission unreviewable discretion as defined in 5 U. S. C. § 701 (a)(2), a provision which has been given a very narrow interpretation. *E.g., Adams v. Richardson,* 156 U. S. App. D. C. 267, 480 F. 2d 1159 (1973). Because the Commission plans no further proceedings before releasing the data, the finality requirement has also been satisfied.

Although plaintiffs are requesting a preliminary injunction, this action, nevertheless, amounts to a review of an administrative determination, and while the heavey [sic] burden imposed on a party seeking a preliminary injunction must be met fully, it is still necessary to define with some precision the scope of review open to this Court.

The appropriate scope of review of the Commission's decision to disclose the accident data is defined in 5 U. S. C. § 706(2)(A):

"The reviewing court shall—

* * *

62. 5 U. S. C. § 701(a) provides:

> "This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

5 U. S. C. § 704 provides in part:

> "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discetion [sic], or otherwise not in accordance with law."

Thus, the Court can prevent disclosure of accident data only if the Commission's actions fall beyond the permissible discretionary range defined by the "arbitrary and capricious" standard. *Citizens to Preserve Overton Park v. Volpe*, 401 U. S. 402, 413-15, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971); *Camp v. Pitts*, 411 U. S. 138, 93 S. Ct. 1241, 36 L. Ed. 2d 106 (1973); *A. O. Smith v. FTC*, 403 F. Supp. 1000 (D. Del., filed September 22, 1975).[63] In *Overton Park, supra*, at 416, 91 S. Ct. 814, 823, district courts were instructed that in applying the "arbitrary and capricious" standard, they "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Furthermore, "[a]lthough this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency." *Id.* See *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U. S. 281, 285-86, 95 S. Ct. 438, 42 L. Ed. 2d 447 (1974). Therefore, although the Court must review the events below with great care, the plaintiffs, nevertheless, must make a clear and convincing showing that the Commission erred and exceeded the bounds of its discretion in deciding to release the accident data.

63. The only other conceivable standards are the "de novo" review provided for by 5 U .S. C. § 706(2)(F) and the "substantial evidence" test of 5 U. S. C. § 706(2)(E). Both *Overton Park, supra*, and *Camp v. Pitts, supra*, make it clear that these approaches are not applicable here. See *A. O. Smith, supra* at 1005.

Also, it is necessary to determine what materials may be considered in reviewing the Commission's actions. "In applying [the 'arbitrary and capricious'] standard, the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts, supra* 411 U. S. at 142, 93 S. Ct. at 1244. This language, the Commission contends,[64] precludes consideration of the Northedge Deposition and the affidavits submitted by both the plaintiffs and defendants. However, in both *Camp v. Pitts, supra* at 142-143, 93 S. Ct. 1241, and *Overton Park,*[65] *supra* 401 U. S. at 420, 91 S. Ct. 814, the Supreme Court recognized that there are occasions when the reviewing court is justified in going beyond the limited administrative record. Although an inquiry of this nature should, as a general rule, be avoided, *United States v. Morgan*, 313 U. S. 409, 422, 61 S. Ct. 999, 85 L. Ed. 1429 (1941); *South Terminal Corp. v. EPA*, 504 F. 2d 646, 675 (C. A. 1, 1974); *National Nutritional Foods Ass'n v. FDA*, 491 F. 2d 1141 (C. A. 2, 1974), *cert. den.* 419 U. S. 874, 95 S. Ct. 135, 42 L. Ed. 2d 113, it is essential in this case in order for the Court to have sufficient information to consider rationally the Commission's actions. *See Nuclear Data, Inc. v. AEC*, 364 F. Supp. 423, 425 (N. D. Ill. 1973).[66]

64. Memorandum in Support of Defendants' Motions for Summary Judgment and Opposition to Plaintiffs (sic) Motions for Preliminary Injunction at 8-9, n. 1 (Docket Item 35, C. A. No. 75-104).

65. The present proceeding, as did *Overton Park, supra*, involves agency action that cannot be classified as either adjudicatory or rule making. See *Texas v. EPA*, 499 F. 2d 289, 296 (C. A. 5, 1974).

66. In somewhat similar circumstances, a district court has been ordered to hold an evidentiary hearing before applying the "arbitrary and capricious" standard. For example, in *Charles River Park "A", Inc. v. HUD*, 519 F. 2d 935 (C. A. D. C., 1975), the plaintiffs sought to prohibit HUD from disclosing to Boston's

Three sources of information not found in the record [67] have been offered to the Court; the deposition of the Commission's engineer and accident data program manager, Robert L. Northedge; the affidavit of Vice Chairman Newman; and affidavits of officers of the plaintiffs.[68] Proper analysis of the uses of the Northedge Deposition and Newman Affidavit in these proceedings requires that descriptions of the data and the Commission's procedure for processing the data be separated from possible explanations of the Commission's decision to release the accident data. Before it can reasonably apply the appropriate legal standards, the Court must first be apprised of the nature of data collected, the value of the data and computer printout to someone studying TV-related accidents, and the means by which the Commission collected and processed the data. The Northedge Deposition and the first twenty-eight paragraphs of the Newman Affidavit provide that information. Neither probing the mental processes of the Commission's officials nor seeking knowledge outside the Commission's own limited sphere is involved.

66. (Cont'd.)
Commissioner of Assessing certain financial information that had been submitted during the course of securing FHA-insured mortgages. The Court of Appeals instructed the reviewing court to conduct an evidentiary hearing but also ordered the review to be carried out under the "abuse of discretion" provision, also under 5 U. S. C. § 706(2)(A), which the Court for convenience referred to as the "arbitrary and capricious" standard. *Cf. Maryland-National Capital Park & Planning Comm. v. U. S. Postal Service*, 159 U. S. App. D. C. 158, 487 F. 2d 1029 (1973).

67. The "record" here encompasses more than the materials contained in the Commission's purported official record. Internal Commission memoranda and even plaintiffs' communications to the Commission can be examined to determine if the Commission should have been aware of certain issues.

68. The affidavits submitted by the plaintiffs are essential to establish irreparable harm required before a preliminary injunction can be issued. However, the Court has not considered plaintiffs' affidavits in evaluating the propriety of the Commission's actions.

On the other hand, paragraph 29 of the Newman Affidavit cannot be considered because it constitutes the most egregious type of "post-hoc rationalization" condemned in *Burlington Truck Lines v. United States*, 371 U. S. 156, 168, 83 S. Ct. 239, 9 L. Ed. 2d 207 (1962), and *SEC v. Chenery Corp.*, 318 U. S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943). The record suggests and the Newman Affidavit clearly states that the Commission relied upon the Cull Memorandum in reaching the decision to disclose the accident data.[69] This memorandum offers the only substantially contemporaneous explanation for the decision.[70] The

69. Newman Aff'd, par. 19.

70. It should be noted that the Cull Memorandum does not discuss all legal arguments offered to the Commission in opposition to disclosure. However, in an informal administrative proceeding, it is not mandatory that the substantially contemporaneous writing relied upon and adopted by the Commission specifically reject every contention. *Cf. Consumers Union of the United States v. Consumer Product Safety Commission*, 491 F. 2d 810, 812 (C. A. 2, 1974).
The picture is further clouded by the Commission's failure to comply with its representation to the manufacturers that the Secretary would make the initial determination which in turn could be appealed to the full Commission. See note 48, *supra*. Deviations from ideal procedure have been viewed as a basis for relaxing the typically close confinement to the administrative record. *Sierra Club v. Hardin*, 325 F. Supp. 99 (D. Alaska 1971).
Denial of promised administrative appeal and the general inadequacy of the record as a factual basis for review have caused the Court to consider remanding the proceedings to the Commission. *See, e.g., Secretary of Labor v. Farino*, 490 F. 2d 885, 890-893 (C. A. 7, 1973); *Shannon v. HUD*, 436 F. 2d 809 (C. A. 3, 1970). Both *Overton Park, supra*, and *Camp v. Pitts, supra*, conferred broad discretion without much guidance on the district courts to determine the appropriate procedures for clarifying the administrative record. *A. O. Smith, supra* at 1012. Under the circumstances—a recently formed agency engaged in an informal proceeding—it does not seem necessary to remand the matter to the Commission. The Northedge Deposition and portions of the

other purposes set forth in the Newman Affidavit are "post-hoc rationalizations" which the Court is precluded from considering as a basis for administrative decision.[71]

IV. Preliminary Injunction.

Before preliminary injunctive relief may be granted, plaintiffs must show (1) a reasonable probability of eventual success on the merits and (2) that they will suffer irreparable harm *pendente lite* if relief is not granted, and, furthermore, the Court must consider (3) the impact of its decision on other interested persons and (4) the public interest. *Oburn v. Shapp*, 521 F. 2d 142, 147 (C. A. 3, 1975); *Delaware River Port Authority v. Transamerican Trailer Transport, Inc.*, 501 F. 2d 917, 919-20 (C. A. 3, 1974); *A. O. Smith Corp. v. FTC*, 396 F. Supp. 1108, 1117-20 (D. Del. 1975) (appeal pending); *Bowers v. Columbia General Corp.*, 336 F. Supp. 609, 613 (D. Del. 1971).

A. Reasonable Probability of Eventual Success.

"It is not necessary that the moving party's right to a final decision after trial be wholly without doubt; rather, the burden is on the party seeking relief to make a *prima facie* case showing a reasonable probability that it will prevail on its merits." *Oburn v. Shapp, supra*, at 148.

Congressional interest in securing manufacturers' cooperation[72] and establishing a harmonious but effective

70. (Cont'd.)
Newman Affidavit provide the Court with an adequate foundation for decision. Indeed, if these sources could not be used, it would be necessary to remand the case to the Commission with instructions to describe in detail the procedure followed in obtaining and processing the data.

71. The Court does consider these arguments when it evaluates the public interest in denying or granting preliminary injunctive relief. See IV C, *infra*.

72. *See, e.g.*, 118 Cong. Rec. 31378-79 (1972) (remarks of Representative Moss).

relationship between the manufacturers and the Commission is reflected in 15 U. S. C. § 2055(b)(1), which provides in pertinent part:

> "The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act]."

Thus, before the Commission may release information to the public, a three step analysis must be satisfied. Failure to comply with any one of the standards means that disclosure would be improper.

At the outset, the Court is confronted by the Commission's oblique suggestion that § 2055(b)(1) may never apply where the information has been requested under the Freedom of Information Act, 5 U. S. C. § 552.[73] However, separate statutes regulating disclosure decisions of administrative agencies do have a significant and independent role. *FAA v. Robertson*, 422 U. S. 255, 95 S. Ct. 2140, 45 L. Ed. 2d 164 (1975). In *Robertson*, in spite of the language of the FOIA exception protecting matters *"specifically* exempted from disclosure by statute," 5 U. S. C. § 552(b)(3) (emphasis added), a statute[74] granting an agency discretion to withhold or release safety information

73. Memorandum in Support of Defendants' Motion for Summary Judgment and Opposition to Plaintiff's (sic) Motions for Preliminary Injunction, 14, n. 4 (Docket Item 35, C. A. No. 75-104). FOIA requests for the accident data have been received by the Commission. Newman Aff'd, pars. 11-14, 20.

74. 49 U. S. C. § 1504.

to the public was found to have continuing viability.[75] The Supreme Court acknowledged that "Congress could appropriately conclude that the public interest was better served by guaranteeing confidentiality in order to secure the maximum amount of information relevant to safety." *Robertson, supra*, 422 U. S. at 267, 95 S. Ct. at 2149.

To argue that § 2055(b)(1) becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming[76] but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided.

First, the Commission is charged with the duty of taking "reasonable steps to assure," before disclosure, the accuracy of information from which the identity of the manufacturer can be readily ascertained.[77] It must be emphasized that the Commission is not a guarantor of the

75. Indeed, the problem of "repeal by implication" facing the Supreme Court in *Robertson*, 422 U. S. at 265-66, 95 S. Ct. 2140, is not present here because the FOIA (1966) was enacted before the Act (1972). The 1974 FOIA amendments, P. L. No. 93-502, did not alter the FOIA's impact in these circumstances.

76. *E.g.*, Hearings on H. R. 8110, H. R. 8157, H. R. 260 (and identical bills) and H. R. 3813 (and identical bills) Before the Subcomm. on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st & 2d Sess. 897-98 (1972) (statement of Mr. Nader).

77. Because the manufacturers are expressly identified, it is not necessary to delineate the contours of the "readily ascertainable" standard of § 2055(b)(1). Each accident report is in a separate file that contains, inter alia, the manufacturer's name. Newman Aff'd, par. 17. The computer printout also identifies the manufacturer whose product allegedly generated that line item. Cull Memorandum, p. 2.

accuracy of the information which it releases; [78] to require the Commission to prove that its materials are accurate would raise an insurmountable barrier to disclosure. Instead, an affirmative obligation to "take reasonable steps to assure" that information which it releases is accurate has been imposed on the Commission.[79] To determine whether the Commission complied with the requirement, the Court must consider both the means selected to gather the data and the procedure employed to process the data.

The Commission strenuously argues that its method fulfilled the statutory mandate of taking reasonable steps for assuring accuracy, but it is difficult to accept this contention on review of the Commission's data-gathering activities.[80] The company that submitted only accurate re-

78. However, H. R. Rep. No. 1153, 92d Cong., 2d Sess. 32 (1972) states that "the Commission has a responsibility to assure that the information which it disseminates is truthful and accurate."

79. The Report of the House Committee on Interstate and Foreign Commerce suggests the underlying rationale for restricting the Commission's discretion to disclose data that it has collected.

> "If the Commission is to act responsibly and with adequate basis, it must have complete and full access to information relevant to its statutory responsibilities. Accordingly, the committee has built into this bill broad information-gathering powers. It recognizes that in so doing it has recommended giving the Commission the means of gaining access to a great deal of information which would not otherwise be available to the public or to Government. Much of this relates to trade secrets or other sensitive cost and competitive information. Accordingly, the committee has written into section 6 [15 U. S. C. § 2055] of the bill detailed requirements and limitations relating to the Commission's authority to disclose information which it acquires in the conduct of its responsibilities under this act." H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972).

80. The Court does *not* suggest in any way that issuing subpoenas duces tecum for all accident data—accurate or inaccurate—was improper. The Commission is the best judge of what is needed for its own internal purposes. In fact, the limitations on disclosure of 15 U. S. C. § 2055 which protect manufacturers enhance the argument for conferring broad subpoena powers on the

ports would not have complied with the requirements of the subpoena because production of all reports—verified or unverified—was ordered by the Commission. One is at a loss to understand how demanding submission of inaccurate data constitutes a reasonable step in assuring the accuracy of information which it will eventually disclose.

The Commission, however, argues that since the reports were submitted by the manufacturers, it cannot be held responsible for the accuracy of the reports. This attempt to shift responsibility for assuring accuracy fails because the duty to take reasonable steps for assuring accuracy was placed on the Commission—not the manufacturers. There is no indication that Congress sought to require manufacturers to investigate each accident report received.[81]

Furthermore, the word "information" as used in § 2055(b)(1) embodies a concept of more than just empirical data. It is especially important to be aware of the impression that will be created by release of the data when the primary purpose for disclosure is to enable comparative safety shopping. Ambiguities in the definition of "TV-related accident" caused some manufacturers to submit

80. (Cont'd.)
Commission. If manufacturers do not have to fear the adverse effects of inaccurate Commission releases, they will be less likely to resist efforts to obtain accident data essential for the Commission's safety standard efforts.

81. Because a manufacturer does not have a duty to investigate accident reports, the Commission's gratuitous offer to allow the manufacturers to challenge the validity of individual accident reports (Aff'd of Sheldon D. Butts, Ass't Secretary of the Commission, par. 2, Docket Item 35, C. A. No. 75-104) does not satisfy the Commission's statutorily imposed duties. The Commission also asserts that it has faithfully satisfied its statutory obligation by merely passing on without error the data submitted by the manufacturers. This argument also ignores the fact that it is the Commission which has the responsibility of striving to make its releases accurate.

only reports of fires and electrical shocks while other manufacturers submitted all accident reports. The Commission was made aware of this potential confusion before it issued its subpoenas but, apparently, refused to take any steps to ameliorate the situation. Furthermore, the Commission never sought to remedy the incomplete responses of some manufacturers to the subpoenas[82] even though the Commission had ample powers to compel compliance. 15 U. S. C. § 2076(c). Clearly defining the data that it sought and seeking full compliance with its subpoenas were but two reasonable steps which the Commission could have taken to assure that the information was accurate.[83]

On the other hand, the procedures followed by the Commission in processing the raw reports were reasonable for assuring accuracy of the information gathered. The careful initial supervision and later random checks were adequate to assure proper transfer of the data obtained to the summary sheets.[84] It appears that standard practices were followed in keypunching and obtaining the computer printout. Finally, while the manufacturers contend that not all duplicates were eliminated,[85] the duplication search

82. Evidently, varying degrees of compliance did not bother the Commission because it believed that it had obtained sufficient data to enable it to begin the process of defining safety standards. (Northedge Dep. p. 260).

83. On the other hand, the uneven quality of record-keeping among the manufacturers was beyond the control of the Commission. While the company which had the best record-keeping operation would, in effect, be punished for its efforts, no reasonable steps were open to the Commission to correct the source of misleading impressions.

84. The data processing phase is described in the text accompanying notes 24-35, *supra*.

85. *E.g.*, Affidavit of John F. Eisenmann, Manager, Consumer Technical Affairs, Aeronutronic Ford Corp., pars. 7, 10 (Docket Item 22, C. A. No. 75-116). Perhaps it is inappropriate to consider these affidavits because, as indicated at notes 64-71 and

also would seem to have been reasonable in the circumstances.

Second, before release of the TV-related accident data can be permitted, disclosure must be "fair in the circumstances." Fairness obviously is a concept that eludes precise definition. Because of the Commission's decision to subpoena unverified reports, the ambiguity of the subpoena, the failure of the Commission to seek compliance by all manufacturers and the differing quality of record-keeping, it is conceded that a comparison of the accident data to determine the relative safety of the various manufacturers' products would be improvident and misleading. However, the only caveat which the Commission proposes to release with the public disclosure relates to one source of error only—the differing qualities of record-keeping. Apparently, nothing will reflect the other sources of possible error.

Basically, the Commission proposes to release information that could unjustifiably damage [86] the manufacturers because the data does not form a reliable foundation for safety comparison—the only contemporaneous reason given by the Commission for the release of the information. Moreover, the public would be misled by the Commission's efforts. Although fairness is difficult to define, it is even more difficult to determine how dis-

85. (Cont'd.)
accompanying text *supra*, they are not part of the administrative record. It is, however, unclear when the printouts were first made available to the companies. If the printouts were not released until after the Commission had made its decision, the companies would not have had any opportunity to comment in a timely fashion to the Commission on the official record. In light of the Court's conclusion on the substantive issue raised by the affidavit, it is not necessary to decide whether the allegation is properly before the Court.

86. The potential harm to plaintiffs is discussed at IV(B) *infra*.

closure of this information would be "fair in the circumstances." [87]

Third, it must be determined whether disclosure is "reasonably related to effectuating the purposes of [the Act]." Only one reason for disclosure was set forth in the contemporaneous Cull Memorandum upon which the Commission relied in deciding to release the information: "The release of the accident data would assist consumers to better evaluate the safety of TVs." [88] One of the purposes of the Act is "to assist consumers in evaluating the comparative safety of consumer products." 15 U. S. C. § 2051(b)(2). Therefore, if it were possible to use this information to contrast the safety records of the various

87. The Commission in attempting to reduce this data to an intelligible format has unintentionally aggravated the problem. A clear computer data listing, with its immediate impact, creates an impression of accuracy that far outshines several filing cabinets of jumbled accident reports.

Furthermore, despite the Commission's contentions to the contrary (Memorandum In Support of Defendant's Motion for Summary Judgment and Opposition To Plaintiff's (sic) Motions for Preliminary Injunction, p. 15, Docket Item 35, C. A. No. 75-104), the release of this information by a government agency carries with it an aura of authenticity which cannot be ignored in determining whether the disclosure is "fair."

88. Cull Memorandum, p. 5.

The administrative record indicates that this was the only contemporaneous explanation for the Commission's decision to disclose. See notes 52-53 and accompanying text *supra*. The "post-hoc rationalizations" of the Newman Affidavit, while not appropriate for consideration here, are addressed when the preliminary injunction issue of harm to the public is reached. See IV(B) *infra*.

The memorandum also urges disclosure in response to the "overriding health and safety issues involved." The Commission obtained the accident reports by early fall of 1974 but did not decide to release them until the spring of 1975. Thus, the Commission, by its own actions, has indicated that time is not of the essence. A generalized warning of the hazards encountered while watching television would not have required identification of the manufacturers. See note 93 *infra*.

manufacturers, disclosure would be reasonably related to achieving the goals of the Act. However, it is clear that the materials which the Commission proposes to disclose cannot aid consumers in determining which television manufacturer has the safest product, and therefore would not be "reasonably related to effectuating the purpose of [the Act]."

Accordingly, plaintiffs have convinced the Court that they have a reasonable probability of success in showing that the Commission failed to "take reasonable steps to assure" that the accident information would be accurate, that disclosure would not be "fair in the circumstances" and would not be "reasonably related to effectuating the purpose" of the Act.[89]

B. Irreparable Harm.

The plaintiffs aver, by way of verified complaint and affidavit,[90] that release of the data to the public would irreparably injure their goodwill and reputations by generating unwarranted adverse publicity. Furthermore, they contend that their competitive positions would be unfavorably affected by public disclosure of sensitive, confidential trade and commercial information.

"Perhaps the single most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 431 (1973). The plaintiffs' reputations

89. In light of the Court's resolution of the issues raised under 15 U. S. C. § 2055(b)(1), it is not necessary to consider the other contentions urged by the plaintiffs for preliminary injunctive relief.

90. *E.g.*, Affidavit of Fred R. Wellner, General Manager, Television Receiver Products Dept., General Electric Co., pars. 4-14 (Docket Item 11A, Ex. A-Aff., C. A. No. 75-136).

would suffer substantially from the Commission's release of misleading safety information.[91] This risk is not merely speculative, and furthermore the irreparable nature of injury to commercial reputations has been widely recognized. *Coca-Cola Co. v. Gemini Rising, Inc.*, 346 F. Supp. 1183, 1189-90 (E. D. N. Y. 1972); *Cutler-Hammer, Inc. v. Universal Relay Corp.*, 285 F. Supp. 636, 639 (S. D. N. Y. 1968).

The information which the Commission proposes to release would not normally have been made public by the plaintiffs, and it appears that the data would appropriately be deemed confidential.[92] The planned disclosures would undoubtedly harm the plaintiffs by giving their competitors access to sensitive information.

Furthermore, once the information is disseminated, the Court becomes powerless to protect or to restore the status quo pending a final determination of the merits. A preliminary injunction is especially appropriate where the action sought to be enjoined would "impair the court's ability to grant an effective remedy." 11 Wright & Miller, Federal Practice and Procedure § 2948, p. 434 (1973).

Thus, the Court finds that disclosure as proposed by the Commission would irreparably harm the plaintiffs. *See Sims v. Greene*, 161 F. 2d 87 (C. A. 3, 1947).

C. Impact on Other Interested Persons and the Public Interest.

The Court must also consider the consequences of its decision on both interested persons and the public in gen-

91. "When the Government focuses adverse publicity on named parties, the consequences to such parties can be disastrous." Gellhorn, Adverse Publicity by Administrative Agencies, 86 Harv. L. Rev. 1380, 1381 (1973).

92. Plaintiffs also argued that the data constituted either trade secrets or other protected confidential information. The Court did not reach these issues and uses the word "confidential" here in a more colloquial sense.

eral. *Delaware River Port Authority v. Transamerican Trailer Transport, Inc., supra.* First, the Commission would not be significantly affected by issuance of a preliminary injunction preventing release of the accident data. The primary objective—obtaining enough data to be able to promulgate safety standards—has been achieved.

Second, in order for a preliminary injunction prohibiting disclosure to harm the public, disclosure first would have had to have been beneficial to the public. The Commission has urged that publicizing the information would assist the public in comparing the safety of various television models. However, it is clear that the data, subject to many potential sources of inaccuracy, simply cannot provide a rational basis for comparative safety shopping.

The Commission also asserts that disclosure would warn the public of hazards associated with the operation of televisions and would suggest questions to ask when purchasing a television, but these two goals could be achieved without releasing the identity of the manufacturers.

Finally, the Commission suggests that the data might be useful to other parties interested in investigating the safety of television receivers. First, the rather speculative benefit is not very significant when compared to the immediate and direct injury that would fall on the plaintiffs if the data were released to the public. Second, it is appropriate to recognize in deciding whether to grant temporary relief that the public interest in the safety investigation is being protected by an energetic and capable Commission investigation.

In sum, it is difficult to perceive how the public interest would be harmed by enjoining the disclosure of information of dubious accuracy.[93]

93. In their memoranda and at oral argument, the parties devoted little attention to the Yereance Report. See notes 36-37 and accompanying text, *supra.* Nevertheless, it appears that plaintiffs still seek to bar its release to the public (Docket Item 42, p. 3, C. A. No. 75-104).

The Yereance Report mentions the manufacturers twice. First, in parallel vertical columns the manufacturers and their respective Commission filing numbers are listed (A-7.) No accident information is revealed, and, furthermore, the filing numbers are not used elsewhere in the report. Second, the report describes the layout of the computer printout and indicates that the printout identifies the manufacturers (B-4.) The names of manufacturers who could be listed are set forth, and, of course, the plaintiffs are included. Again, no accident information is discussed in conjunction with mention of the manufacturers. Thus, while the Yereance Report is a sobering study of the physical dangers that one may encounter while watching television, the manufacturers are in no way singled out for special attention. There is nothing in the Yereance Report that relates or links accident data to a particular manufacturer.

Therefore, it appears that public dissemination of the Yereance Report would not harm the manufacturers. The absence of irreparable harm is an appropriate basis for declining to grant preliminary injunctive relief. *Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture,* 469 F. 2d 1387, 1388 (C. A. 3, 1972).

Furthermore, public interest considerations militate against enjoining disclosure. The Yereance Report represents a straightforward, easy to read document that can inform the public of television hazards. Balancing the benefits of the disclosure against the minimal adverse consequences that might affect the television manufacturing industry as a whole indicates that enjoining disclosure of the Yereance Report would be improper.

Thus, the Court will not issue a preliminary injunction prohibiting disclosure of the Yereance Report.

Accordingly, the Court finds that it is appropriate to preliminarily enjoin the disclosure to the public of the accident data and the computer printout.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F. R. Civ. P.

An order will be entered in accordance with this opinion.

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

Minute Order Termination.

A preliminary injunction was issued in the above case on October 23, 1975 and since the parties do not now know whether further action is contemplated in this litigation, there is no need to maintain these cases as open litigation for statistical purposes, therefore it is

ORDERED

1. The Clerk is hereby instructed to submit a JS-6 form to the Administrative Office and close these cases for statistical purposes.

2. Nothing contained herein shall be considered a dismissal or disposition of the matter and should further proceedings become necessary or desirable, any party may initiate in the same manner as if this minute order had not been entered.

Dated: August 20, 1976.

/s/ JAMES L. LATCHUM
Chief Judge

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

September 15, 1977

Memorandum Opinion.

LATCHUM, *Chief Judge.*

The plaintiffs in these twelve actions [1] are manufacturers of television receivers who seek to permanently enjoin the Consumer Product Safety Commission ("Commission"), its members and officers from releasing to the public certain television-related accident data which the plaintiffs contend is privileged, confidential, misleading and inaccurate. The accident data had been furnished to the Commission after it publicly requested and later issued subpoenas duces tecum pursuant to its authority under 15 U. S. C. § 2076(b)(3). However, this Court on October 23, 1975, after a hotly contested battle exemplified by the extensive briefs filed and oral arguments presented, entered a preliminary injunction enjoining the Commission's public release of the contested data pending a final hearing on the merits of the plaintiffs' conten-

1. There were thirteen separate actions, but one suit, Teledyne Mid-America Corp. v. Consumer Product Safety Commission, C. A. No. 75-122, was voluntarily dismissed. Docket Item 63 in C. A. No. 75-122.

tion. GTE Sylvania, Inc. v Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). The Commission's notice of appeal filed on December 12, 1975, with the Third Circuit was voluntarily dismissed on May 10, 1976, after the Solicitor General evidently concluded that it was unlikely under the circumstances that the Third Circuit could be persuaded to reverse this Court's decision to preliminarily enjoin disclosure. During the ensuing two years, the parties informally suspended activity in these actions apparently awaiting the final determination of a related issue in cases then pending in the District Court for the District of Columbia [2] and in the Western District of New York.[3] In July, 1977, the plaintiffs filed motions to make permanent the preliminary injunction.[4] The Commission responded by filing motions to vacate the preliminary injunction [5] and for summary judgment [6] and by moving to transfer these cases to the District Court for the District of Columbia pursuant to 28 U. S. C. § 1404 (a).[7] This opinion addresses only the question of the propriety of a transfer of these actions.

The federal transfer statute provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. § 1404(a).

2. Consumers Union of the United States v. Consumer Product Safety Commission, C. A. No. 75-705 (D. D. C.).

3. Pierce & Stevence Chemical Corp. v. Consumer Product Safety Commission, C. A. No. 1975-410 (W. D. N. Y.).

4. Docket Item 51 in C. A. No. 75-104.

5. Docket Item 79 in C. A. No. 75-104.

6. Docket Item 80 in C. A. No. 75-104.

7. Docket Item 55 in C. A. No. 75-104.

In order to secure a change of venue the burden is upon the moving party to show that the action might have been brought in the District of Columbia and that the interest of justice and the convenience of the parties and witnesses require the transfer of these actions to the transferee district.[8]

There is no dispute that the plaintiffs had the right to initially bring these actions in the District of Columbia. The district court there would have personal jurisdiction over the Commission because it resides in the District of Columbia and because the "wrongful" conduct as alleged in the complaint occurred there; for the same reason, venue would be appropriate under 28 U. S. C. § 1391 (e)(1) or (2) which allows a civil action against an agency of the United States to be brought in the judicial district in which the agency resides or in which the cause of action arose. Thus the Court has the *power* to transfer.

Turning now to the criteria for transfer, the Commission does not contend that the convenience of the parties and witnesses requires a transfer of these actions to the District of Columbia. With commendable candor it conceded at oral argument that the convenience factor is in equipoise; a trial of these actions in this forum would be just as convenient for the parties and witnesses as trial in the District of Columbia.

Whether the transfer here sought is warranted under § 1404(a) must therefore be judged by the remaining statutory criteria of whether it is in the interest of justice. The Commission points to the fact that the Consumers Union of the United States, Inc. and Public Citizen's Health Research Group ("FOIA requesters") on May 5, 1975, after the original cases had been filed in this district,

8. Shutte v. Armco Steel Corp., 431 F. 2d 22 (C. A. 3, 1970), *cert. denied*, 410 U. S. 910 (1971).

brought an action [9] ("D. C. case") under the Freedom of Information Act ("FOIA") in the District Court for the District of Columbia against the Commission and twelve of the manufacturers who are plaintiffs in these actions seeking access to the same television accident reports which are the subject matter of this litigation. The D. C. case was dismissed on September 12, 1975. Consumers Union of the United States, Inc. v. Consumers Product Safety Commission, 400 F. Supp. 848 (D. D. C. 1975). In that case the District Court found that there was no "case or controversy" between the plaintiff and the Commission and that the complaint failed to state a claim against the television manufacturers upon which relief could be granted. Almost two years later, on July 5, 1977, the D. C. Court of Appeals reversed the District Court finding that there was a "case or controversy" between the FOIA requesters and the Commission because (1) there was disagreement between the parties as to the scope and effect of the Delaware proceedings, and (2) that the Delaware action had been dismissed in fact and had been dropped by the acquiescence of the parties. Consumers Union et al. v. Consumers Product Safety Commission, No. 75-2059 (Slip opinion D. C. Cir., decided July 5, 1977). Upon rehearing the D. C. Circuit Court, noting its erroneous assumption in its July 5, 1977, opinion that the Delaware cases had in fact been dismissed or dropped, nevertheless adhered to its prior decision that a case or controversy exists between the FOIA requesters and the Commission for the reason the Commission continues to refuse to produce the documents because of the preliminary injunction outstanding in this litigation. Consumers Union et al. v.

9. The FOIA requesters, although aware of the earlier filed Delaware cases, did not seek to intervene in the instant cases but for "strategic reasons" filed the D. C. suit instead. This Court, although aware of the FOIA requesters, was without power to bring them into the Delaware litigation involuntarily.

Consumers Product Safety Commission, No. 75-2509 (Slip opinion decided Aug. 25, 1977).

The Commission now argues from the history of the D. C. litigation that the Delaware and District of Columbia actions "have arrived at the same stage and are ready for a full hearing" and that a transfer from Delaware (1) would avoid the possibility of inconsistent results on the merits, (2) would bring all parties including the FOIA requesters, who have interests of disclosure and non-disclosure, together in one forum, and (3) would eliminate difficulties of the Commission in conducting pretrial discovery and duplicate trials in two fora.

First, the Court finds that the Commission has failed to meet its burden of showing that the D. C. case, which was later filed, is in about the same stage and posture as this litigation. In the present suits both parties have moved for summary judgment with accompanying main briefs, discovery has been practically completed, and following the determination of this transfer motion, briefing can be quickly completed and oral argument promptly held. More importantly, a voluminous record relating to the merits of this case is already before the Court having been filed in preparation of the hearings on the motions for a preliminary injunction which has since been supplemented by recent discovery procedures. In contrast, nothing towards the disposition of the merits has been accomplished in the D. C. litigation. The most recent development there is that the Court of Appeals on September 9, 1977, stayed its mandate until October 4, 1977, in order to give the television manufacturers an opportunity to petition for a Writ of Certiorari to the United States Supreme Court. Moreover, this Court has been advised that several of the television manufacturers have filed motions to dismiss on jurisdictional grounds which must be

first determined by the D. C. District Court before reaching the merits even if Certiorari is denied.[10] Thus, the present record clearly shows that this first filed litigation is much farther advanced towards final disposition of the merits than is the later filed D. C. litigation. These two factors distinguish this litigation from the situations in Jacobs v. Tenney, 316 F. Supp. 151, 167-171 (D. Del. 1970) and Hall v. Kittay, 395 F. Supp. 261 (D. Del. 1975). After comparing the posture of the litigation here with that in the D. C. Court, it is obvious that granting a transfer from Delaware would unduly delay a determination of the merits. After all, if the Commission is successful here on their present summary judgment motion or after trial if one is necessary, there would be no need to pursue the D. C. litigation since the Commission has stated that it is ready to disclose the accident reports.

The fact that the Commission will be required to proceed in two fora which may result in inconsistent orders on the merits is not an uncommon possibility, particularly when an action may not be transferred to another district in which similar litigation is pending because the action could not have been originally brought there. *See* Phillips Petroleum Company v. Federal Energy Administration, — F. Supp. — (D. Del. 1977) (slip opinion June 27, 1977). That possibility as well as duplicate trials, however, could be easily avoided now if the interested FOIA requesters, who instituted this D. C. action after the first cases were brought here, would voluntarily intervene in this litigation. What the Commission overlooks by their argument of inconsistent results and duplicate trials is that this possibility existed from the time the later D. C. suit was filed until the D. C. District Court dismissed that suit on September 12, 1975. The time for the Commission to have moved

10. Warwick Electronics, Inc. has moved in District of Columbia Court to dismiss for lack of jurisdiction because it did no business in the district.

for a transfer of these cases was in the early stages of this litigation in 1975 before all the effort and work had been expended here.

Furthermore, five of the plaintiffs here initially filed their actions in the district courts of New York[11] and Pennsylvania,[12] but all consented, at the urging of counsel for the Commission, to have their actions transferred and heard in this forum. The Commission expressly stipulated that this district was the "appropriate forum" even though a comparable law suit was then pending in the District of Columbia.

For this reason also the Court is not inclined, especially at this late date and after one transfer of five cases, to relieve the Commission of whatever additional burden it must bear as a result of past legal oversights. Furthermore, the Court does not believe that the burden is as onerous as the Commission implies. As previously noted, most of the discovery has been completed with respect to the primary legal issue raised in these actions; duplicative discovery can be further avoided merely by stipulations that discovery taken in connection with these actions can be used in the District of Columbia and by coordinating any discovery that remains to be taken.[13] Since the legal

11. Matsushita (C. A. No. 75-2040), Sharp (C. A. No. 75-2049) and Toshiba (C. A. No. 75-2050) filed actions in the Southern District of New York and General Electric (75-CV-189) filed suit in the Northern District of New York.

12. Admiral (C. A. No. 75-531) filed suit in the Western District of Pennsylvania.

13. This likewise answers the Commission's suggestion that unless a transfer is granted there exists a threat of inconsistent discovery orders issuing from this district and the District of Columbia court. Moreover, it is represented to the Court that little or no discovery has been taken in the District of Columbia litigation. If that representation is accurate, the threat of inconsistent discovery orders is even more illusory since, as already noted, most of the requisite discovery has already been taken in connection with the actions pending here.

issues are substantially the same, briefs and/or affidavits are likely to be similar and the only additional costs to the Commission will be filing papers in that district and sending an attorney to argue motions.

Finally, although the Court is not unmindful of the societal interest in preserving limited judicial resources, it is not so clear that judicial economy will necessarily follow from a transfer of these actions. Having carefully considered the factual and legal contentions which were set forth in the briefs and affidavits submitted by the parties and at the hearing on the preliminary injunction, this Court is familiar with the legal issues raised in the pending cross motions for summary judgment which soon will be ripe for final decision. Economy of judicial effort, in terms of the efficient resolution of both the overriding private concerns of the litigants and the interests of the general public, may well be best served by an orderly and expeditious disposition of the actions pending in this district.

While recognizing the possibility of inconsistent orders from different courts is a legitimate consideration under § 1404(a), the present posture of these actions together with the policy favoring the prompt adjudication of disputes—particularly those which bear importantly upon substantial interests of the public—convinces this Court that the administration of justice will be advanced by denying the motion to transfer.[14] As the Court earlier noted, most of the discovery connected with this litigation has been, or soon will be, completed, the parties have filed appropriate cross-motions for summary judgment with at least some of the requisite supporting briefs and affidavits,

14. *Cf.* Campbell v. Mitsubishi Aircraft International, Inc., 416 F. Supp. 1225 (W. D. Pa. 1976); Penn v. Goldman Sachs & Co., 397 F. Supp. 392 (S. D. N. Y. 1975); Nagle v. Pennsylvania R. R. Co., 89 F. Supp. 822 (N. D. Ohio 1950).

and the Court is prepared to deal expeditiously with the issues raised therein. Viewed from this perspective, the interest of justice is better served by a prompt resolution of dispositive legal issues raised in the motions or, if necessary, upon a trial on the merits. In short, the Court concludes that the Commission has failed to demonstrate that the convenience of the parties and witnesses, in the interest of justice, warrants a transfer of these actions to the District of Columbia.

An order will be entered denying the Commission's motion to transfer and will fix a schedule for the completion of briefing on the cross-motions for summary judgment.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.

December 8, 1977

Opinion.

LATCHUM, *Chief Judge.*

On October 23, 1975, this Court made extensive findings of fact and conclusions of law when it granted plaintiffs'[1] motions to enjoin preliminarily the Consumer Product Safety Commission (the "Commission") from disclosing certain "TV-related accident data" submitted by the plaintiffs and a computer printout summarizing that data to the public in response to a request made under the Freedom of Information Act ("FOIA"), 5 U. S. C. § 552. GTE Sylvania Inc. v. Consumer Product Safety Commission, 404 F. Supp. 352 (D. Del. 1975). Because the prior opinion sets forth the factual background of this litigation in great detail, it will not be rehearsed here.

1. Originally there were thirteen separate actions brought by as many television manufacturers which were consolidated for consideration of plaintiffs' motions for a preliminary injunction. Since the Court's opinion of October 23, 1975, the suit brought by Teledyne Mid-America Corp., C. A. No. 75-122, has been dismissed by stipulation of the parties. Docket Item 63 (all docket item references are to C. A. No. 75-104).

The Court based its decision to grant a preliminary injunction on the Commission's failure to comply with Section 6(b)(1) of the Consumer Product Safety Act (the "Act"), 15 U. S. C. § 2055(b)(1). Section 6(b)(1) provides in pertinent part:

> The Commission shall take reasonable steps to assure, prior to its public disclosure thereof, [1] that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and [2] that such disclosure is fair in the circumstances and [3] reasonably related to effectuating the purposes of [the Act].

The Court found on the uncontested facts that the Commission had wholly failed to take reasonable steps to assure that any of the three prerequisites for public disclosure of the TV-related accident data were met. 404 F. Supp. at 370-73.

The consolidated cases are presently before the Court (1) on plaintiffs' motion for summary judgment to make the preliminary injunction permanent[2] and (2) on the Commission's motions to vacate the outstanding preliminary injunction and for summary judgment.[3]

Despite the two-year passage of time, the undisputed facts upon which the Court based its earlier decision have not changed. Thus, the Court need not reconsider any of its earlier findings and conclusions in order to take account of any intervening changes in the *factual* situation. However, the Commission does contend that there have been intervening *changes of law* which should prompt this Court to reconsider its previous decision. To these arguments we now turn.

2. Docket Item 86.
3. Docket Items 79 & 80.

I. Commission's Interpretation of Section 6(b)

First, in opposing the plaintiffs' motions for a preliminary injunction, the Commission suggested that Section 6(b)(1) applies only to affirmative disclosures initiated by the agency, such as press releases and publications, and not to disclosures made in response to FOIA requests.[4] The Court rejected such an interpretation of Section 6(b) because it contravened the legislative history of the section.[5] Nevertheless, the Commission has renewed the argument, contending that two developments since the Court's previous decision support the Commission's position. The developments are: (1) the Commission formally endorsed the interpretation of Section 6(b)(1) which limits the section's applicability to "affirmative" disclosures initiated by the agency,[6] and (2) Congress, in explaining a 1976 amendment to Section 29 of the Act (15 U. S. C. § 2078), used language which arguably indicates acceptance of the Commission's interpretation. After considering both these developments, however, the Court remains convinced that Congress did not intend to make Section 6(b) inapplicable in the face of an FOIA request.

4. *See* Docket Item 35, p. 14, n. 4.

5. GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 369-70.

6. The Commission recorded its interpretation of Section 6(b) as a "minute" of an executive session held on October 6, 1975 (Docket Item 80, Ex. C). Although that interpretation preceded the decision on the preliminary injunction motion by a few weeks, the Commission did not inform the Court of it at that time. In addition, the Commission recently published proposed procedures for complying with Section 6(b). 42 Fed. Reg. 54,304 (1977) (to be codified in 16 C. F. R. Part 1013). In the prefatory comments, the Commission reiterated its view that Section 6(b) applies only when it "actively and publicly discloses information." *Id.*

The Commission, relying on three Supreme Court cases,[7] contends that its interpretation of Section 6(b) deserves great weight in this Court. Although the cases cited establish the principle that on matters of statutory construction a court should give deference "to the interpretation given the statute by the officers or agency charged with its administration," [8] they do not justify the application of that principle in this case. Two of them, Zemel v. Rusk, 381 U. S. 1, 11-12 (1965) and Udall v. Tallman, 380 U. S. 1, 16-18 (1965), involved long-established administrative interpretations which the respective agencies had applied consistently and frequently.[9] In sharp contrast, the interpretation being advanced by the Commission here did not arise until after the present controversy began. The third case cited by the Commission, E. I. duPont de Nemours & Co. v. Collins, — U. S. —, —, 97 S. Ct. 2229, 2234 (1977), is also distinguishable. There, the Supreme Court held that the Fourth Circuit erred in substituting its judgment for that of the Securities Exchange Commission ("SEC") as to the appropriate method

7. E. I. duPont de Nemours & Co. v. Collins, — U. S. —, —, 97 S. Ct. 2229, 2234 (1977); Zemel v. Rusk, 381 U. S. 1, 11 (1965); Udall v. Tallman, 380 U. S. 1, 16 (1965).

8. Udall v. Tallman, *supra*, 380 U. S. at 16.

9. In both cases, Congress knew about the administrative interpretations of the statutes in question but had not amended those statutes. The Court viewed such Congressional inaction as indicating approval of the agency's position. Zemel v. Rusk, *supra*, 381 U. S. at 11; Udall v. Tallman, *supra*, 380 U. S. at 17-18. It is noteworthy that since this Court rejected the Commission's interpretation in its prior decision, Congress has not amended Section 6(b), although that decision has been brought to Congress' attention and other sections of the Consumer Product Safety Act have been amended. *See* Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, 90 Stat. 503; for instances where representatives of the Commission discussed this Court's prior decision before Congressional committees, *see* Docket Item 112, p. 24-25.

for determining value in a merger involving a closed end investment company. The Court noted that the SEC had "long recognized" the method it used, and that it was, "as Congress contemplated, the product of the agency's long and intimate familiarity with the investment company industry." *Id.* at —, 97 S. Ct. at 2234. This case, on the other hand, presents a narrow legal issue which is readily susceptible to judicial resolution and requires no special expertise of the Commission. In sum, because none of the factors which warrant deference to an agency's position exist in this case, the Court will accord no special weight to the Commission's interpretation of Section 6(b)(1).

The second development which the Commission contends supports its interpretation of Section 6(b)(1) is a a statement in the legislative history of a 1976 amendment to Section 29 of the Act.[10] Section 29, 15 U. S. C. § 2078, concerns cooperation between the Commission and other federal and state agencies. The 1976 amendment authorizes the Commission to provide nonconfidential portions of accident and investigation reports to such agencies. 15 U. S. C. § 2078(e). The amendment further provides:

> No Federal agency or State or local agency or authority may disclose to the public any information contained in a report received by the agency or authority under this subsection unless with respect to such information the Commission has complied with the applicable requirements of section [6(b) of the Act]. *Id.*

10. Consumer Product Safety Commission Improvements Act of 1976, Pub. L. No. 94-284, § 15, 90 Stat. 510 (amending 15 U. S. C. § 2078 (Supp. III 1973)).

The explanation of the amendment to Section 29 contained in the Conference Report includes the following statement:

> The requirement that the Commission comply with section 6(b) prior to another Federal agency's public disclosure of information obtained under the Act is not intended by the conferees *to supersede or conflict with* the requirements of the [FOIA] (5 U. S. C. 552(a)(3) and (a)(6)). The former relates to public disclosure initiated by the Federal agency while the latter relates to disclosure initiated by a specific request from a member of the public under the [FOIA].

H. R. Rep. No. 1022, 94th Cong., 2d Sess. 27, *reprinted in* [1976] U. S. Code Cong. & Ad. News 1029 (emphasis supplied).

Although the statement of the Conference Committee appears consistent with the interpretation espoused by the Commission, it does not present a reliable basis for inferring that four years earlier, when Section 6(b) was enacted, Congress intended to make it inapplicable to disclosures made in response to FOIA requests. "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." United States v. Price, 361 U. S. 304, 313 (1960), *quoted in* United States v. Philadelphia National Bank, 374 U. S. 321, 348-49 (1963). Similarly, the impact of the Conference Committee's statement is diminished by the failure of Congress to amend Section 6(b) in 1976, when it presumably knew[11] of the prior decision in this case, in which the Court stated:

11. *See* note 9 *supra*.

> "To argue that [Section 6(b)(1)] becomes irrelevant during the pendency of a FOIA demand is to ignore a clear Congressional concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer. Congress was aware that FOIA requests for information gathered by the Commission would be forthcoming but, nevertheless, imposed affirmative obligations on the Commission which cannot flippantly be avoided." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 1370 (footnote omitted).

Finally, by stating that they did not intend the Section 29 requirement of compliance with Section 6(b) "to supersede or conflict with the requirements of the [FOIA] (5 U. S. C. 552(a)(3) and (a)(6))," the conferees emphasized the need for some sort of accommodation between the different time restraints imposed by Section 6(b) and the FOIA. Notably, the statement does not make Section 6(b) altogether inapplicable in the face of a FOIA request, as the Commission would do.

The provisions of the FOIA cited by the conferees [12] impose a duty on federal agencies to respond within ten days in most cases, and promptly in any event, to FOIA requests. Section 6(b)(1) provides that at least thirty

12. Subsection (a)(3) of 5 U. S. C. § 552 provides that each agency, upon request, shall make reasonably described records "promptly available" to the requester. Subsection (a)(6) requires an agency to determine within ten days (excepting Saturdays, Sundays and legal public holidays) after the receipt of a FOIA request whether to comply with the request and provides for a ten-day extension of that time limit in "unusual circumstances." Subsection (a)(6) further provides that a requester shall be deemed to have exhausted his administrative remedies if the agency fails to comply with the prescribed time limits. 5 U. S. C. § 552(a)(6)(C).

days prior to disclosing information from which the identity of a manufacturer can be readily ascertained the Commission must, "to the extent practicable, notify" such manufacturer and provide him "with a reasonable opportunity to submit comments to the Commission in regard to such information." 15 U. S. C. § 2055(b)(1). The Commission contends than an "impermissible conflict" exists between the thirty-day notice requirement of Section 6(b) and the ten-day time limit for responses under the FOIA.[13] The Court disagrees, because in 1972 when Congress enacted the Consumer Product Safety Act, the FOIA required only that an agency make records "promptly available" to any person requesting them.[14] The ten-day requirement was not introduced until 1974, when Congress amended the FOIA.[15] Given that Section 6(b) has not been amended since 1972, the differences between the time periods specified in Section 6(b) and the FOIA cannot be used to infer a Congressional intent to limit the application of Section 6(b) to affirmative disclosures. Indeed, such an interpretation completely ignores the legislative history of Section 6(b). *See* Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, — F. Supp. — (W. D. N. Y., *filed* October 26, 1977) (C. A. No. 75-410) (slip op.)

The Court concludes, therefore, that Section 6(b) applies to all disclosures which are not exempted from compliance by Section 6(b)(2), 15 U. S. C. § 2055 (b)(2),[16] and the Commission should attempt to accom-

13. Docket Item 81, pp. 17-19.

14. Pub. L. No. 90-23, 81 Stat. 54 (1967) (current version at 5 U. S. C. § 552(a)(6)).

15. Pub. L. No. 93-502, § 1(c), 88 Stat. 1562 (1974) (codified at 5 U. S. C. § 552(a)(6)).

16. The Commission contends that if Section 6(b)(1) applies in this case, it also must apply to thousands of other records, such

modate the time periods of both statutes to the fullest extent practicable.[17]

II. Amendment to FOIA Exemption 3

Next, the Commission argues that the Court should reconsider and reverse its prior holding that Section 6(b)(1) is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U. S. C. § 552(b)(3), because Congress amended that exemption in 1976 with the express intent of overruling the Supreme Court's ruling in

16. (Cont'd.)
as consumer complaints and petitions for rulemaking under Section 10 of the Act, 15 U. S. C. § 2059, which are regularly requested under the FOIA. Docket Item 81, pp. 18-19. The Court expresses no opinion on this proposition, except to note, without deciding, that petitions for rulemaking under Section 10 arguably are exempt from the requirements of Section 6(b)(1) as information concerning an administrative proceeding within the meaning of Section 6(b)(2)(B).

17. *Cf.* Chrysler Corp. v. Schlesinger, — F. 2d —, 14 E. P. D. ¶ 7868, at 6312 (C. A. 3, 1977). In the *Chrysler* case, a government agency notified Chrysler that it had received a request under the FOIA for certain documents concerning one of Chrysler's plants. The agency's regulations permitted a contractor to challenge a decision to disclose such information and guaranteed a final decision within thirty days from the date the challenge was filed. *Id.* at —, 14 E. P. D. ¶ 7868, at 6304-05, 6314 n. 27. Due to the ten-day response time prescribed by the FOIA, the agency, upon deciding to release the information, informed Chrysler that it could not await the results of an administrative appeal and would release the information five working days later. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6305. Chrysler filed suit in a district court to enjoin the disclosure and the Third Circuit held the case was ripe for judicial review despite Chrysler's failure to exhaust its administrative appeal remedy. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6312. Contrary to the Commission's contention (Docket Item 111, p. 5), the Court in *Chrysler* did not "reject[ ] agency proceedings which would conflict with the mandate of the FOIA time requirements"; rather, the court resolved the conflict in a manner calculated to give effect to the purposes of both the FOIA and the administrative review procedures.

FAA v. Robertson, 422 U. S. 255 (1975), upon which this Court relied in reaching its previous decision. Although the change in the law clearly necessitates reconsideration of the issue, the Court cannot agree with the defendants' position that Exemption 3, as amended, does not exempt material withheld pursuant to Section 6(b)(1).

Originally, Exemption 3 of the FOIA provided:

> (b) This section does not apply to matters that are—
>
> • • •
>
> (3) specifically exempted from disclosure by statute.

5 U. S. C. § 522(b)(3) (1970) (amended 1976). Congress amended this exemption in 1976 to exclude from the mandatory disclosure provisions of the FOIA, matters that are

> (3) specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.[18]

The Conference Committee, which was responsible for the language of the amendment as finally enacted, explained the purpose of the amendment as follows:

> The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA*

18. Pub. L. No. 94-409, § 5(b), 90 Stat. 1241 (1976). The amendment passed as a rider to the Government in the Sunshine Act. Note, *The Effect of the 1976 Amendment to Exemption Three of the Freedom of Information Act*, 76 Colum. L. Rev. 1029, 1041 n. 70 (1976).

> *v. Robertson,* 422 U. S. 255 (1975), which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U. S. C. 1306).[19]

The thrust of the defendants' argument is that Section 6 (b)(1) is indistinguishable from the statute involved in *FAA v. Robertson, supra.* Because Congress expressed a clear intent to exclude Section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. § 1504) from Exemption 3, the Commission contends that Section 6(b)(1) of the Consumer Product Safety Act (15 U. S. C. § 2055(b)(1)) must be excluded from the exemption as well.

Section 1104 authorizes the Administrator, upon receipt of a written objection, to withhold information from public disclosure if, in his judgment, disclosure "would adversely affect the interests of [the objecting party] and is not required in the interest of the public." 49 U. S. C. § 1504. By holding that information withheld pursuant to Section 1104 constituted matter "specifically exempted from disclosure by statute" within the meaning of the original Exemption 3, the Supreme Court in *FAA v. Robertson, supra,* made it possible for government officials to avoid the mandatory disclosure provisions of the FOIA on general discretionary grounds such as "in the public interest." Congress reacted by amending Exemption 3 to

19. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2250 (Conference Report). The intent to undo *FAA v. Robertson, supra,* was also evident earlier in the legislative process. *See* H. R. Rep. No. 880, Part I, 94th Cong., 2d Sess. 9-10, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2191-92; Note, *supra* note 18, 76 Colum. L. Rev. at 1042-44.

prevent agencies from avoiding disclosure on such nebulous grounds.[20]

After comparing the two statutes, the Court concludes that Section 6(b)(1) does not afford the Commission the same broad discretion to withhold information that Section 1104 gives to the Administrator of the FAA. Section 6 (b)(1) requires the Commission, as a prerequisite to disclosing "information from which the identity of [a] manufacturer or private labeler may be readily ascertained," to "take reasonable steps to assure": (1) that the information is "accurate," (2) that the disclosure is "fair in the circumstances," and (3) that the disclosure is "reasonably related to effectuating the purposes of [the Act]." 15 U. S. C. § 2055(b)(1). The requirement of accuracy most clearly distinguishes Section 6(b)(1) from Section 1104 of the Federal Aviation Act, because "accuracy" is a more definite and objective standard than the "interest of the public." Similarly, the Court considers the fairness criteria in Section 6(b)(1) more susceptible to effective judicial review than the public interest standard of Section 1104.[21]

Having found Section 6(b)(1) distinguishable from the statutes [22] which Congress specifically stated would not

20. *See* Seymour v. Barabba, 559 F. 2d 806, 807 (C. A. D. C. 1977).

21. *See* Note, *supra* note 18, 76 Colum. L. Rev. at 1045 & n. 100.

22. Besides Section 1104 of the Federal Aviation Act of 1958 (49 U. S. C. § 1504), the Conference Report also identified Section 1106 of the Social Security Act (42 U. S. C. § 1306) as a statute whose terms do not bring it within Exemption 3. H. R. Rep. No. 1441, 94th Cong., 2d Sess. 14, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2250 (Conference Report). Section 1106 of the Social Security Act prohibits disclosure of a wide range of social security information, except as the Secretary of HEW or the Secretary of Labor "may by regulations prescribe." 42 U. S. C. § 1306(a). Thus, Section 1306 vests virtually "unfettered and unguided power" in the Secretary to determine what information to disclose. Stretch v. Weinberger, 495 F. 2d 639, 640 (C. A. 3, 1974). As indicated above, the Commission's discretion under Section 6(b)(1) is much more circumscribed.

be covered by Exemption 3, we now turn to the language of the exemption itself to determine whether Section 6 (b)(1) falls within its ambit. The two provisos of Exemption 3 are in the disjunctive. Subpart A exempts from the FOIA matters that are "specifically exempted from disclosure by statute . . . , provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue." Because Section 6(b)(1) affords the Commission some discretion in determining whether to withhold material from the public, it is not the type of mandatory nondisclosure statute described in subpart A of Exemption 3. *See* Irons v. Gottschalk, 548 F. 2d 992, 994 n. 3 (C. A. D. C. 1976), *petition for cert. filed,* 46 U. S. L. W. 3055 (August 18, 1976) (No. 77-203). Subpart B exempts matters authorized to be withheld pursuant to one of two distinct types of statutes: (1) those which establish "particular criteria for withholding" and (2) those which "refer[ ] to particular types of matters to be withheld." 5 U. S. C. § 552(b)(3); *see* Kruh v. General Services Administration, 421 F. Supp. 965, 967 n. 4 (E. D. N. Y. 1976). The plaintiffs argue that Section 6(b)(1) satisfies both the standards contained in subpart B of Exemption 3. However, because the Court agrees that Section 6(b)(1) establishes particular criteria for withholding, it is unnecessary to decide whether the statute also refers to particular matters to be withheld.

The only guidance which Congress provided concerning the contours of the exemption for statutes establishing particular criteria for withholding is that it does not extend to statutes like the one at issue in *FAA v. Robertson, supra.* The few cases decided since the amendment became effective in March of 1977 have not shed much more light on

the matter.[23] It is noteworthy, however, that the only commentator to address the issue has concluded that Section 6(b)(1) would fall within the amended Exemption 3, under the "particular criteria for withholding" rubric. Note, *supra* note 18, 76 Colum. L. Rev. at 1045 n. 100. The legislative histories of Section 6(b)(1) and Exemption 3 support the same conclusion. As the Court stated in its prior decision in this case, Section 6(b)(1) reflects the balance struck between the Commission's need to have complete access to information relevant to its statutory responsibilities and Congress' "concern both for the accuracy of the information disseminated and for the damage that an identified manufacturer might suffer." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra,* 404 F. Supp. 352, 370 & n. 79. Due to the sensitive nature of much of the information the Consumer Product Safety Act authorized the Commission to gather, the House Committee on Interstate and Foreign Commerce reported that it had

> written into section 6 [15 U. S. C. § 2055] of the bill *detailed requirements and limitations relating to the*

23. In a case strikingly similar to this one, a district court judge held that Section 6(b)(1) of the Act "is a statute setting forth particular criteria for withholding information" and, therefore, falls within the ambit of FOIA Exemption 3. Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, — F. Supp. —, — (W. D. N. Y., decided October 26, 1977) (C. A. No. 75-410) (slip op. at 8). In that case, however, the court relied on *FAA v. Administrator, supra* and this Court's prior decision without discussing the legislative history of the amendment to Exemption 3 and its effect on the continuing validity of those two precedents.

Two other cases decided after the amendment to Exemption 3 became effective concerned Subpart A and the "particular types of matter" standard of Subpart B of the exemption, respectively. *See* Seymour v. Barabba, 559 F. 2d 806 (C. A. D. C. 1977); Founding Church of Scientology v. National Security Agency, 434 F. Supp. 632 (D. D. C. 1977).

> *Commission's authority to disclose information* which it acquires in the conduct of its responsibilities under this Act.

H. R. Rep. No. 1153, 92d Cong., 2d Sess. 31 (1972) (emphasis supplied). As the emphasized language makes clear, Congress intended Section 6(b)(1) to limit the discretion of the Commission to disclose information submitted to it.

A review of the legislative history of the original version of Exemption 3 led the Third Circuit "to a firm conviction that the absence of [legislatively prescribed] standards to govern broad agency discretion was the chief evil at which Congress aimed." Stretch v. Weinberger, 495 F. 2d 639, 640-41 & n. 5 (C. A. 3, 1974). Nothing in the legislative history of the amendment to Exemption 3 suggests that the intent of Congress has changed.[24] Rather, the amendment overruled *FAA v. Robertson, supra,* in which the Supreme Court, according to Congress, had "misconceive[d] the intent of Exemption 3" by interpreting it to include a statute which granted an agency almost unlimited discretion to withhold documents. *See* H. R. Rep. No. 880, 94th Cong., 2d Sess., pt. 1, at 23, *reprinted in* [1976] U. S. Code Cong. & Ad. News 2205; Seymour v. Barabba, *supra,* 559 F. 2d at 807. Congress did not exclude from the amended Exemption 3 all statutes which give an agency some discretion concerning whether to disclose certain information. Therefore, the Court concludes that Section 6(b)(1), which requires the Commission to

24. *See generally* Note, *supra* note 18, 76 Colum. L. Rev. at 1041-43. The author concluded that Congress intended to limit the exemption to statutes in which the concern for secrecy emanated from Congress rather than the agency. *Id.* He would assess the particularity of the criteria for withholding information according to their amenability to *de novo* judicial review, as provided for by the FOIA. *Id.* at 1045.

take reasonable steps to assure accuracy, fairness and a statutory purpose before disclosing information which identifies a manufacturer, establishes particular criteria for withholding and falls within Exemption 3 of the FOIA, as amended.

III. Third Circuit's Decision in Chrysler v. Schlesinger.

The final legal development which the Commission contends should lead this Court to modify the findings and conclusions made in conjunction with the issuance of the preliminary injunction is the decision of the Third Circuit in Chrysler Corp. v. Schlesinger, — F. 2d —, 14 Empl. Prac. Dec. ¶ 7868 (C. A. 3, 1977). In *Chrysler* the court held that "the APA provides a cause of action for enjoining an agency from disclosing submitter-generated information," citing with approval the prior decision in this case. *Id.* at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311, 6318 n. 88.[25] In addition to recognizing a reverse FOIA cause of action, the Third Circuit suggested that in such cases the courts employ the following analytical approach in reviewing an agency's decision to disclose:

> First it should inquire whether any non-disclosure statute or non-disclosure regulation is applicable. If so, the court must conclude that the agency has acted outside the scope of its statutory authority, and should enjoin disclosure. If no non-disclosure statute or regulation applies, the court must then determine under what authority the agency intends to disclose the contested information. If the agency has con-

25. In light of *Chrysler Corp. v. Schlesinger, supra,* the Commission has abandoned its argument that this Court lacks jurisdiction to review the decision to release the records at issue here. Docket Item 118, p. 5.

> cluded that the contested information does not fall within any FOIA exemption, thus mandating disclosure, the court must examine whether the agency applied the proper legal standards for the applicability of the FOIA exemptions. * * * Finally, if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the above analysis, the remedy is not a trial *de novo*, but a remand to the agency for an additional record or explanation for its decision.

Id. at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311-12 (footnote omitted).

In the case *sub judice*, the Commission concluded that the contested information did not fall within any FOIA exemption. Having already decided that, by virtue of Section 6(b)(1) of the Act, Exemption 3 applies to the accident data the Commission intends to disclose, the Court will bypass the first of the suggested inquiries—"whether any non-disclosure statute or non-disclosure regulation is applicable." [26] Instead, the Court turns to the Commission's alternative argument that, even if Exemption 3 applies, the Commission has complied with the requirements of Section 6(b)(1).

26. At oral argument, the plaintiffs argued that Sections 6(a)(2) and 6(b)(1) of the Consumer Product Safety Act (15 U. S. C. §§ 2055(a)(2) and (b)(1)) and 18 U. S. C. § 1905, which is incorporated in Section 6(a)(2), are "non-disclosure statutes" as that phrase was used in the *Chrysler* opinion. (Transcript ("T. —") 17-19). The Commission disputed the characterization of Section 6(b)(1) as a "non-disclosure statute" and argued that the plaintiffs have not shown that the contested information is protected from disclosure by Section 6(a)(2) and 18 U. S. C. § 1905. (T. 30-31, 38-39). The Court expresses no opinion on these issues.

The decision to grant the plaintiffs' motions for a preliminary injunction was based on the finding that the Commission had not satisfied its duty under Section 6(b)(1) to take reasonable steps to assure (1) that the accident data is "accurate," (2) that disclosure would be "fair in the circumstances," and (3) that disclosure would be "reasonably related to effectuating the purposes of [the Act]." GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 370-373. The Court expressly held that the Commission's proposals (1) to release the accident data with a statement pointing out the differing qualities of recordkeeping among the manufacturers and (2) to correct any inaccuracies identified by the manufacturers were insufficient to satisfy the affirmative duties imposed by Section 6(b)(1). *Id.* at 371-72 & n. 81. Nevertheless, the Commission now argues that these steps, together with an offer to release with the data "statements prepared by the manufacturers describing how their subpoenaed data should be viewed," constitute compliance with the three criteria for disclosure.[27] Not wishing to repeat the analysis in its prior opinion, the Court notes only that the inclusion of such statements by the manufacturers will not facilitate meaningful comparisons of the accident data to determine the relative safety of the various manufacturers' products. Much of the data will remain unverified. The inaccuracies and unfairness introduced by the Commission's failure to clarify ambiguities in the definition of "TV-related accident" in the subpoenas and to seek full compliance with its subpoenas will persist. In

27. Docket Item 81, p. 35. In Pierce & Stevens Chemical Corp. v. Consumer Product Safety Commission, *supra*, — F. Supp. at — (slip op. at 4 n. 3), the court concluded that the inclusion of a statement by the manufacturer asserting its viewpoint would not dispel the possibility of irreparable harm from disclosure of information like that at issue here.

short, the Commission still has failed to demonstrate that disclosure is reasonably related to effectuating the purposes of the Act.[28] Accordingly, the Court finds that the Commission has not fulfilled its responsibilities under Section 6(b)(1).

The last step in the analytical framework set forth in Chrysler Corp. v. Schlesinger, *supra*, requires a remand to the agency, "if the agency record does not establish, or insufficiently explains, the basis for the agency's decision, so as not to permit the reviewing court to effectively perform the . . . analysis." Seizing upon this language, the Commission argues that a remand is appropriate here, because "the record is unclear, as to whether or not 6-b(1) was considered" in processing the request for the accident reports.[29] The Court disagrees. As noted in the prior opinion,[30] the administrative records in this case supplemented by the affidavit of Constance B. Newman,[31] Vice Chairman of the Commission, and the deposition of Robert L. Northedge,[32] who was the project director of the Com-

28. The fact that the accident data could be compared profitably on the basis of the presence or absence of safety features or on the basis of type, such as black and white televisions versus color televisions, is irrelevant. The Commission could accomplish that purpose without identifying the manufacturers.

29. T. 30; Docket Item 118, p. 7.

30. GTE Sylvania Inc. v. Consumer Product Safety Commission, *supra*, 404 F. Supp. at 368-69 & n. 70.

31. Docket Item 27 (C. A. No. 75-112).

32. Based on the holding in Chrysler Corp. v. Schlesinger, *supra*, — F. 2d at —, 14 Empl. Prac. Dec. ¶ 7868, at 6311, that judicial review in reverse FOIA cases should be limited to the administrative record and should not involve a trial *de novo*, the Commission now contends that Court should not consider portions of the Northedge deposition. (T. 43). The argument is without merit. This Court's determinations in the prior opinion concerning the scope of judicial review and the materials to be reviewed comport completely with the principles expressed in the *Chrysler* case. Relying on Citizens to Preserve Overton Park v. Volpe, 401 U. S. 402, 420 (1971), and Camp v. Pitts, 411 U. S. 138, 142-43 (1973), the Court decided to supplement the administrative record with the Newman affidavit and Northedge deposition in order to understand the basis for the Commission's decision to disclose the accident data. GTE Sylvania Inc. v. Consumer Products Safety Commission, *supra*, 404 F. Supp. at 367-68. The Third Circuit explicitly recognized the propriety of such a procedure in the *Chrysler* opinion. — F. 2d at —, 14 Empl. Prac. Dec. ¶ 7868, at 6318 n. 96.

Mr. Northedge occupied a position of responsibility with respect to gathering and processing of the TV-related accident data. The Commission itself produced him as the person best able to explain the data gathering process. The Court concludes, therefore, that there is no reason to exclude the Northedge deposition. Moreover, the opinions expressed by Mr. Northedge concerning the misleading nature of the information and the absence of any use for it are merely cumulative, and do not form the basis for the Court's decision.

mission's investigation of television hazards, provides this Court with an adequate foundation for effective review. Moreover, the Court foresees no benefit which possibly could flow from a remand in the circumstances of this case.

Conclusion

In conclusion, the Commission has presented no new facts which warrant modification of the findings of fact and conclusions of law made in conjunction with the issuance of the preliminary injunction. The Commission has referred to several changes in the law since the Court's prior decision, but none of these affect the validity of the previous conclusions. Specifically, the Court rejects the Commission's interpretation of Section 6(b)(1) as applying to "affirmative" agency disclosures, but not to disclosures made in response to FOIA requests. Where as in this case, an FOIA request is received for information from which the identity of a manufacturer can be readily ascertained and which is otherwise subject to Section 6(b)(1),

the Commission must comply with Section 6(b)(1) before disclosing that information. Furthermore, if the Commission fails to take reasonable steps to assure that the information is accurate and that disclosure will be fair and serve a statutory purpose, the information will be exempt from disclosure under FOIA Exemption 3. The TV-related accident data at issue here is exempt from disclosure, because the Court finds that the Commission still has not complied with Section 6(b). Finally, the Court finds that the disclosure of this information in its present unverified state and in a manner which identifies the manufacturers would result in irreparable harm to the plaintiffs for the reasons set forth in the Court's previous opinion. 404 F. Supp. at 373-74.

Accordingly, the plaintiffs' motion for summary judgment will be granted and a permanent injunction against the public disclosure of the accident data and the computer printout will be entered.

This opinion shall constitute the findings of fact and conclusions of law required by Rule 52, F. R. Civ. P.

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No.75-104

GTE SYLVANIA INCORPORATED, et al.

v.

CONSUMER PRODUCT SAFETY COMMISION, et al.

Judgment and Permanent Injunction.

On the basis of findings of fact and conclusions of law set forth in the Court's opinion of October 23, 1975 (404 F. Supp. 352) and the Court's opinion of this date entered in these cases, it is

ORDERED

1. Summary judgment is hereby entered in favor of the plaintiffs and against the defendants.

2. Defendants' motions to vacate the outstanding preliminary injunction and for summary judgment are denied.

3. The defendants Consumer Product Safety Commission ("Commission"), its members, agents, officers, employees and all other persons in active concert and participation with them are hereby enjoined from disclosing to the public in any manner:

(a) Any data submitted by plaintiffs to the defendant Commission in response to a special order issued May 13, 1974;

(b) Any data submitted by plaintiffs to the Commission in response to a subpoena duces tecum issued by the Commission on July 26, 1974; and

(c) Any report, extraction, computer analysis, or other document or documents purporting to be a summary or compilation of the data previously supplied to the Commission described in sub-paragraphs (a) and (b) above.

4. Provided, however, the Commission is not enjoined hereby from making certain limited disclosures to Underwriters Laboratories, Inc. ("UL"), the entity retained by the Commission to develop safety standards for television receivers under 15 U. S. C. § 2056, upon the following terms and conditions:

(a) UL and those assisting in development of safety standards for television receivers shall be permitted access to computerized summaries of "accident reports" submitted to the Commission in response to the Commission's July 26, 1974 subpoena duces tecum (served on 12 television manufacturers) in a form that does not, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis. The computerized summaries shall contain no identifying symbols which will permit identification of "accidents" reported by a single manufacturer.

(b) For the sole purpose of developing safety standards for television receivers and not for public disclosure, the following employees of UL shall be permitted access to all of the "accident reports" and data submitted to the Commission by the 12 television manufacturers: Mr. S. David Hoffman, Mr. John Stevenson, Mr. Steven Coen and Ms. Frances Newell. These four employees of UL will make use of such "accident reports" and data only in connection with the development of safety standards for television receivers and will not disclose the "accident reports" or data nor make any written or oral reports of the contents thereof to any person other than an employee of the Commission. No other written or oral reports will be prepared by these four employees of UL, which will in any way, directly or indirectly, identify the manufacturer, model or chassis number of any television receiver alleged to have been involved in any "accident" or the number of "accidents" allegedly associated with any particular manufacturer, model or chassis.

5. Provided further, however, that the Commission is not enjoined hereby from public disclosure of the "Report on Analysis of TV Accident Data to Consumer Product Safety Commission," dated April 25, 1975 by Robert A. Yereance (the "Yereance Report") so long as that Report or any accompanying information does not in any way, directly or indirectly, identify the manufacturers, model or chassis number of any television receivers alleged to have been involved in any "accidents" allegedly associated with any particular manufacturer, model or chassis.

6. Copies of this permanent injunction shall be furnished to Messrs. Hoffman, Stevenson and Coen, and Ms. Newell, and all others assisting UL in the development of safety standards for television receivers forthwith.

Dated: December 8, 1977.

/s/ JAMES L. LATCHUM
James L. Latchum
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1328

GTE SYLVANIA, INC., et al.

v.

CONSUMER PRODUCT SAFETY COMMISSION, et al.,

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE.

Consumers Union of the United States, Inc. ("Consumers Union") and the Public Citizen's Health Research Group ("Health Research Group") hereby move this Court for leave to file a brief *amicus curiae* urging that the decision below be vacated for failure to comply with Rule 19 of the Federal Rules of Civil Procedure.

1. This appeal is from a decision in 12 consolidated actions enjoining the defendant Consumer Product Safety Commission from releasing certain information regarding accidents and hazards of color television sets submitted to it by the plaintiff-manufacturers. In each of these so-called "reverse Freedom of Information Act" cases, the manufacturer sued only the Consumer Product Safety Commission and its members ("CPSC"), but did not name Consumers Union or the Health Research Group, whose request for the documents led to the CPSC's decision to release them. Consumers Union and the Health Research Group are plainly concerned with, and will be affected by, the outcome of any decision in these cases, and they have brought their own Freedom of Information Act lawsuit in which both the CPSC and the 12 manufacturers have

been joined in the United States District Court for the District of Columbia. *See Consumers Union of the United States, Inc. v. Consumer Product Safety Commission*, 561 F. 2d 349 (D. C. Cir. 1977), *on rehearing*, 565 F. 2d 721, *vacated for further consideration*, — U. S. — , 46 U. S. L. W. 3452 (Jan. 16, 1978).

2. The only issue that will be raised by the defendants-appellants here is the correctness of the ruling of the District Court on the merits of the controversy. *Amici*, however, seek to raise a different issue: the failure of the District Court and the parties to take into account the requirements of Rule 19 of the Federal Rules of Civil Procedure as it relates to the interests of *amici*. No attempt was made to join *amici* in the complaint, and no explanation was given for not doing so. The defendants did not seek to invoke Rule 19 or call it to the Court's attention, and the District Court did not raise the issue on its own. Therefore, if *amici* do not present this issue to this Court, no one will. Moreover, the question presented is an important one, going both to the Court's jurisdiction and to the efficient handling of reverse FOIA cases, and therefore should be considered by this Court.

3. Consents have been sought from both the CPSC and the manufacturers, but they have been denied.

4. If the Court permits the briefs which are lodged with this motion to be filed, the appellants should also be required to answer the contentions raised by *amici* at the time that the appellees' briefs are due, and not as part of any reply brief that appellants may file. This is essential in order to afford *amici* an opportunity, if they so desire, to submit a response when the reply briefs are due.

For the foregoing reasons, the brief of Consumers Union and the Health Research Group as *amicus curiae*

should be permitted to be filed, and all responses thereto should be served and filed at the time that the appellees' briefs are due on this appeal.

Respectfully submitted,

[Signatures of Counsel Deleted]

Date: Washington, D. C.

May 1, 1978

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 78-1328

GTE SYLVANIA, INC., et al.

v.

UNITED STATES CONSUMER PRODUCT SAFETY COMMISSION, et al.

MOTION OF CONSUMER FEDERATION OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

Consumer Federation of America ("CFA") moves, pursuant to Rule 29, Federal Rules of Appellate Procedure, for leave to file a brief as amicus curiae in the above-captioned matter.

INTEREST OF AMICUS CURIAE

CFA was incorporated in 1968 in the State of New York, and is composed of over 225 national, state, and local consumer organizations located throughout the nation, including those states encompassed by the Third Circuit. Representing over 30 million American consumers, CFA is the largest consumer organization in the United States. As such, CFA seeks to present the viewpoints and interests of consumers before Congress, regulatory agencies, and the courts.

CFA has been active in a variety of court and agency proceedings pertaining both to consumer product safety and to the rights of the public under the Freedom of Information Act, 5 U. S. C. § 552 ("FOIA"). For example,

CFA has participated in the development of Consumer Product Safety Commission ("CPSC" or "Commission") regulations dealing with the reporting of consumer product safety hazards under § 15 of the Consumer Product Safety Act, 15 U. S. C. § 2064 ("CPSA"); recordkeeping requirements for consumer product safety complaints under § 16 of the CPSA, 15 U. S. C. § 2065; and regulations under § 6(b)(1) of the CPSA, 15 U. S. C. § 2055 (b)(1), the statutory provision whose construction is at issue in this case. Additionally, CFA has directed substantial effort toward proper implementation of the FOIA. CFA has sought to maximize public access to information possessed by federal agencies and has appeared as *amicus curiae* in various FOIA cases.* More specifically, CFA has already participated as *amicus curiae* in a Second Circuit case which involved the interrelationship between § 6(b)(1) and the FOIA.** Since this case involves the interpretation of a provision of important consumer protection legislation which affects citizen access to information under the FOIA, it is of particular interest to CFA and its members.

Reason Why CFA's Brief As Amicus Curiae Is Desirable

CFA proposes primarily to address two issues: 1) whether § 6(b)(1) of the CPSA was intended to apply

* *E.g.*, Consumers Union v. Heimann, No. 77-2115 (D. C. Cir.); Parkridge Hospital, Inc. v. Blue Cross and Blue Shield of Tennessee, No. 77-1576 (6th Cir.); Chrysler Corp. v. Schlesinger, 565 F. 2d 1172 (3d Cir. 1977), *cert. granted*, — U. S. — (March 6, 1978); and Westinghouse Electric Corp. v. Schlesinger, 542 F. 2d 1190 (4th Cir. 1976), *cert. denied*, 431 U. S. 924 (1977).

** Pierce and Stevens Chemical Corp. v. Consumer Product Safety Commission, No. 77-6215 (2d Cir. 1978). At oral argument on April 4, 1978, the Second Circuit remanded this case to the district court essentially to make a final, rather than preliminary, determination of the propriety of injunctive relief.

to records sought pursuant to the FOIA; and 2) whether § 6(b)(1) is a withholding statute under exemption three of the FOIA, 5 U. S. C. § 552(b)(3). CFA proposes to address these issues from the perspective of consumers, and requesters of information under the FOIA. Moreover, it is our understanding from counsel that the defendant-appellant Commission will not directly address whether § 6(b)(1) provides the particularized substantive criteria necessary to qualify as a withholding statute under exemption three of the FOIA. Consideration of that issue, an issue reached by the court below, will be enhanced by the brief of CFA as amicus.

CFA is prepared to file its brief within the time allowed to the Commission. Therefore CFA submits that this motion will not result in any delay of these proceedings. Finally, it should be noted that the Commission has consented to CFA's participation as amicus curiae in this case.

Respectfully submitted,

[Signatures of Counsel Deleted]

May 12, 1978